1940

Alice Loos v. Mountain Fuel Supply Company and Utah Motor Park Incorporated : Appellants' Abstract of Record

Utah Supreme Court

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

ALICE LOOS,

Plaintiff and Respondent,

vs.

MOUNTAIN FUEL SUPPLY COMPANY, a corporation, and UTAH MOTOR PARK, INCORPORATED, a corporation,

Defendants and Appellants.

No. 6211

APPELLANTS' ABSTRACT OF RECORD

Appeal from The District Court of The Third Judicial District in and for Salt Lake County, State of Utah.

Hon. P. C. Evans, Judge, Presiding

INDEX

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APPEARANCES:

L. B. WIGHT,
Attorney for Plaintiff and Respondent.

INGEBRETSEN, RAY, RAWLINS & CHRISTENSEN and JOSEPH S. JONES,
Attorneys for Mountain Fuel Supply Company, Defendant and Appellant.

BADGER, RICH & RICH and WILLIAM H. FOLLAND,
Attorneys for Utah Motor Park, Incorporated, Defendant and Appellant.

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1 Plaintiff's complaint. Filed August 5, 1938.

5 Demurrer of defendant Utah Motor Park, Incorporated, to plaintiff's complaint. Filed August 24, 1938.

8 Demurrer of defendant Mountain Fuel Supply Company to plaintiff's complaint. Filed August 25, 1938.

10 Summons on return. Filed August 5, 1938.

13 Notice of Hearing on Demurrers. Filed August 29, 1938.

14 Entered Order, P. C. Evans, Judge, September 9, 1938, upon motion of L. B. Wight, counsel for plaintiff, it is ordered that the hearing of the separate demurrers of the defendants is continued to Saturday, September 10, 1938, at the hour of ten o'clock A. M.

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15 AMENDED COMPLAINT

Plaintiff alleges as follows:

1. That the defendants, Mountain Fuel Supply Company, and Utah Motor Park, Incorporated, are and during all times herein mentioned have been corporations, organized and existing under and by virtue of the laws of the state of Utah.

2. That the defendant, Mountain Fuel Supply Company, hereinafter referred to as Gas Company, is and during all times herein mentioned has been engaged in the business of supplying to the said Utah Motor Park, Incorporated, and to others in Salt Lake City, Utah, and elsewhere, gas for fuel and other purposes for use in cooking and heating by means of pipes laid under ground from its source of supply and by means of connections leading from its system of pipes to the heating and cooking facilities in the apartments maintained by the said Utah Motor Park, Incorporated, conveying such gas, under pressure, to such cooking and heating facilities for use by the tenants of said Utah Motor Park, Incorporated.

15 3. That said Utah Motor Park, Incorporated, hereinafter referred to as Park Company, is, and during all times herein mentioned has been

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engaged in the business of owning, operating, and renting to its patrons and tenants, furnished apartments located between Main and State Streets and south of Ninth South Street, in Salt Lake City, Utah, and elsewhere, which apartments were, during all times herein mentioned, supplied with cooking and heating facilities, and with fuel gas from the system of pipes of the
16 said defendant, Mountain Fuel Supply Company.

4. That on January 22, 1938, plaintiff was a tenant of the said Park Company and in the possession and occupation of apartment No. 403 of said company, in which she had her clothing, household effects, personal effects and property of the value of $250.00 and had theretofore paid the rents and charges for the use of said apartment in advance. That said apartment consisted of the west half of a one-story frame building 18 feet wide and 36 feet long, set on an eight inch concrete foundation, the floor of which was approximately 20 inches above the surface of the ground; That at said time said apartment was heated by means of a gas furnace installed in a pit or excavation under the floor near the center of said building and the partition dividing said apartment from the one at the east end of said building; That said furnace was equipped with a pilot light kept constantly burning, and with a rod projected through the floor by means

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of which gas could be turned into said furnace from said pipes, which gas became ignited from said pilot light; That in installing said furnace and the said pipes and connections the same were projected through the said partition and so maintained during all times herein mentioned.

5. That the defendants knew, or should have known, that by reason of the danger that said pipes and connections would become cracked or broken, or otherwise develop leaks and permit gas to escape into said apartment or into the area under the floor thereof where said pilot light was maintained as aforesaid, and by reason of the great inflammability and explosive force of such gas when mixed with air it was the duty of the said defendants to make and keep said pipes and connections free from breaks, leaks or imperfections by which gas might escape therefrom and to avoid placing or permitting weight or stress upon said pipes, or to so place them that they might be cracked or broken, and to avoid making alterations or repairs to said building or excavations thereunder in such manner as to cause said building to settle upon or
17 put stress upon said pipes and cause breaks or leaks therein, and to make frequent and careful inspection of said pipes for the safety and protection of the tenants occupying said apartments; And it was likewise the duty of the defendants

to provide proper and sufficient ventilation of the area under the floor of said apartment so that should gas leak or escape into said area it would pass freely therefrom and not be confined therein, and to maintain said ventilation facilities free from obstruction.

6. That plantiff is informed and believes and therefore alleges that the defendants, after the construction of said building, carelessly and negligently excavated a pit for the installation, and installed therein a furnace at or near the center of said building, equipped with a pilot light as aforesaid, and so near the foundation and support of said building under the said partition separating said apartments as to permit the same to settle and the weight thereof to rest upon the pipes so furnishing gas to said furnace so projected through the said partition between said apartments, and carelessly and negligently failed and neglected to provide proper and sufficient ventilation for the area under said apartments, and carelessly and negligently closed or permitted the small openings provided as ventilators to be closed and obstructed, and carelessly and negligently failed and omitted to make frequent or any inspection of said pipes, connections, or premises for the protection of the occupants of said apartment, and negligently and carelessly continued to furnish gas under pres-

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sure to the apartment so occupied by plaintiff after they knew, or by the exercise of ordinary care should have known that said pipes were broken, defective and leaking gas into the area under said floor and that the ventilators thereto were closed and obstructed.

7. That by reason of such negligent acts and omissions on the part of said defendants, said pipes and connections were cracked and broken and gas in large quantities leaked into the area under said floor and became mixed with the air therein and was not permitted to escape therefrom, on said 22nd day of January, 1938, and became ignited and exploded with great
18 force and violence, driving and bursting said floor upward against plaintiff and bursting the walls of said apartment and causing the ceiling to fall upon plaintiff and the whole thereof to become ignited and burned, by reason of which and as a result of such negligent acts and omissions of the defendants as aforesaid, plaintiff's left internal malleolus, her left fibula, and the right calcis bones were fractured; she suffered a compound comminuted fracture of the calcis bone of her left foot; the muscles, tendons, nerves and tissues of her feet and legs were broken and injured and she was rendered sick, sore and lame and her feet, legs, back and body were wrenched and bruised, and she suffered great

shock and permanent injury to her nerves and nervous system; that her said left foot became infected and her body toxic; that she suffered great physical pain and mental distress, and will continue so to suffer for the rest of her life; that she was confined in a hospital from the date of her said injuries and from the date of said explosion, to the 14th day of August, 1938, and incurred liability and obligations for hospital care and expense in the sum of $966.28; for blood transfusions in the sum of $50.00, and for medical and surgical care in the sum of $500.00; That on July 13th, 1938, by reason of said injuries so caused by the negligence and carelessness of the defendants, she was compelled to permit the amputation of her left leg below the knee and will be crippled and unable to perform her duties of housewife or to secure employment for the rest of her natural life; That her personal and household effects and clothing, in said apartment as aforesaid, was, by reason of said explosion and fire, burned, injured or destroyed to the amount of $150.00, all to plaintiff's damage in the sum of $51,716.28.

WHEREFORE, plaintiff demands judg-

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ment against the said defendants in the sum of $51,716.28, and for costs.

L. B. WIGHT
Attorney for Plaintiff.

Verification, Served Feb. 2, 1939,

Filed February 2, 1939.

20 *Demurrer*

Comes now the defendant Utah Motor Park, Incorporated, and demurs to plaintiff's amended complaint heretofore filed herein, and for grounds of demurrer alleges that said amended complaint does not state facts sufficient to constitute a cause of action against said defendant.

Served February 14, 1939, and
Filed February 14, 1939.

21 *Demurrer*

Comes now the defendant, Mountain Fuel Supply Company, and demurs to plaintiff's amended complaint on file herein and for cause of demurrer alleges that plaintiff's amended complaint does not state facts sufficient to constitute a cause of action against the defendant, Mountain Fuel Supply Company.

Served February 14, 1939, and
Filed February 14, 1939.

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22 *Notice of Hearing on Demurrers*

Notice to defendants calling up defendants demurrers for hearing on Monday, February 20, 1939, at 2 o'clock P. M.

Served February 14, 1939, and
Filed February 14, 1939.

22A ENTERED ORDER by ALLEN G. THURMAN, JUDGE, February 21, 1939. The Court having heretofore taken under advisement the matter of its decision after a hearing upon the demurrers of the defendants, Mountain Fuel Supply Company and Utah Motor Park to plaintiff's complaints, now orders that said demurrers and each of them be overruled with leave to said defendants to answer within ten days after notice.

23 *Notice of Overruling Demurrers, Etc.*

Notice to defendants of overruling its demurrers to plaintiff's amended complaint and that defendants have ten days after notice within which to answer said amended complaint.

Served February 24, 1939,

Filed February 25, 1939.

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24 *Answer of Defendant Mountain Fuel Supply Company*

Comes now the defendant Mountain Fuel Supply Company, and answering plaintiff's amended complaint on file herein admits, denies, and alleges as follows:

1. Admits all of the allegations in paragraph 1 thereof.

2. Answering paragraph 2, thereof, this defendant admits that it was at all times mentioned in plaintiff's amended complaint engaged in the business of supplying to the defendant Utah Motor Park, and to others in Salt Lake City, Utah, and elsewhere, gas for fuel and other purposes for use in cooking and heating by means of pipes laid underground from its source of supply, but this defendant denies each and every other allegation therein contained.

3. Admits all of the allegations contained in paragraph 3 thereof except defendant denies that the system of pipes leading to the apartments of the defendant Utah Motor Park were owned, operated or maintained by this answering defendant.

25 4. Answering paragraph 4, thereof, defendant admits that on the 22nd day of January,

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1938, the plaintiff was in the possession and occupation of apartment No. 403 of the Utah Motor Park, that said apartment consisted of approximately the west one-half of a one-story frame building approximately eighteen feet wide and thirty-six feet long, set on a concrete foundation; that at said time there was located in an excavation under the floor of said apartment a gas furnace used in the heating of said apartment and that said furnace was equipped with a pilot light and with a rod projecting through the floor by means of which rod the gas supply could be turned into said furnace; that this defendant has no knowledge or information sufficient to enable it to form a belief as to the truth of the other allegations contained in said paragraph, and therefore, denies each and every other allegation therein set forth.

5. Denies each and every allegation contained in paragraph 5 thereof.

6. Answering paragraph 6 thereof, this defendant denies that it excavated or caused to be excavated a pit for the installation of the furnace in or under the apartment therein referred to or that it installed or caused to be installed a furnace in or under the said apartment, or that it installed, or owned, or operated, or maintained any of the pipes or connections under or

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in said apartment, denies that it closed or permitted to be closed any openings or ventilators in or under said apartment, and denies that any of the pipes or connections in or under said apartment were broken or defective, or that any
26 gas leaked therefrom, and denies that it knew or should have known that said pipes or connections were broken or defective or that gas was leaking therefrom, and denies that it knew or should have known that the ventilators in or under said apartment were closed or in any manner obstructed, and specifically denies each and every allegation contained in said paragraph.

7. Answering paragraph 7 thereof, this defendant admits that on or about the 22nd day of January, 1938, an explosion occurred in, under or about the said apartment, and that the plaintiff received some injury by reason thereof, but defendant denies that said explosion was caused or that it resulted from any negligence or carelessness whatsoever on the part of the defendants, or either of them; that the defendant has no knowledge of the nature, or extent, or character of the injuries received by the plaintiff as result of said explosion, and therefore, denies that the plaintiff was injured or damaged in the manner or to the extent alleged in said paragraph, and defendant denies that the plaintiff was damaged or injured to any extent, or at all,

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as a result of any negligence or carelessness on the part of this defendant, and denies that any household effects or clothing of the plaintiff were damaged, or injured, or destroyed as a result of any negligence or carelessness on the part of this defendant, and this defendant specifically denies each and every allegation contained in said paragraph 7 not hereinabove specifically admitted or denied.

8. Defendant denies each and every allegation contained in plaintiff's amended complaint not hereinabove specifically admitted or denied.

WHEREFORE, defendant prays that plaintiff's complaint be dismissed and that it have judgment against the plaintiff for its costs incurred herein.

Verification
Served March 9, 1938, and
Filed March 9, 1939.

28 ANSWER

Comes now the defendant Utah Motor Park, Incorporated, a corporation, and answering the amended complaint of plaintiff on file herein admits, denies and alleges as follows, to-wit:

I.

Admits the allegations of paragraphs 1, 2, and 3.

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II.

Answering paragraph 4 of said amended complaint defendant admits that plaintiff was a tenant of defendant and that she was in possession and occupancy of said apartment No. 403, and that she had certain of her clothing, household effects and personal effects therein, the exact character and value of which are unknown to this defendant. Defendant further admits that said apartment was the west half of a one story frame building which was approximately eighteen feet wide, thirty-six feet long, and on a concrete foundation approximately eight inches wide, and that the floor was approximately twenty inches above the surface of the ground. Defendant further admits that said apartment was heated by means of a gas furnace installed in a slight pit or excavation under the floor of said building, and that said furnace was equipped with a pilot
29 light for the regulation thereof approximately as alleged in paragraph 4. Defendant further admits that one of the pipes for the conveyance of gas into said west apartment projected through the partition was between the west and east apartment.

III.

Answering paragraph 5 defendant denies that it knew or should have known, or had any

reason to believe that the pipes and connections conveying said gas would become cracked or broken and otherwise develop leaks and permit gas to escape into said apartment, or into the area under the floor thereof, and denies that it knew or should have known or had any reason to believe that any gas which might escape into the area beneath the floor would come in contact with the pilot light in connection with said furnace, but on the other hand defendant alleges that the area beneath the floor of said cottage was sealed off from said pilot light, and the area where said pilot light was located opened into the portion of said cottage above the floor.

IV.

Answering paragraph 6 of said amended complaint defendant admits that after the construction of said building it employed an independent contractor to install therein a floor furnace, but denies that it was installed at or near the center of said building, and on the other hand alleges that it was installed in the living room of said dwelling some distance from the center of said building. Defendant denies that it was guilty of any negligence or carelessness in permitting or having the said furnace so installed, and denies that the making of said slight pit or excavation therefor caused any settling of

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said building or apartment, and denies that there was any settling of said building, and denies that defendant knew or should have known of any settling of said building. Defendant alleges on the other hand that it employed a licensed and competent heating and ventilating engineer for the installation of said furnace, and that if there was any carelessness or negligence on the part of said heating or ventillating engineer defendant denies that it knew thereof, or had any reasonable ground to believe that there was any carelessness or negligence in connection therewith. Defendant denies that it closed or permitted the opening provided as a ventillator beneath said cottage to be closed and obstructed, and on the other hand defendant alleges that such ventillator was open beneath said cottage at the times alleged and set forth in plaintiff's complaint. Defendant denies that it failed to make frequent and proper inspections of the pipes, connections and premises involved in said accident, and denies that it knew or should have known that any pipes beneath or within said premises were broken, defective or leaking, or that the ventillators were obstructed.

V.

Answering paragraph 7 defendant admits that on or about the 22nd day of January, 1938, there was an explosion under or within said

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apartment, and that the floor was driven upwards causing the walls of said apartment to burst and the ceiling to fall, and causing said apartment to become ignited and burn. Defendant further admits that plaintiff suffered some injuries by reason thereof, but the extent, character, and seriousness thereof are to defendant unknown, and defendant therefore denies the same and puts plaintiff upon her proof with reference thereto. Defendant denies, however, that said accident and injuries were caused by any carelessness or negligence upon the part of the defendant as alleged in plaintiff's complaint, and denies that any negligence or carelessness of this defendant was the proximate cause of any injuries to plaintiff as alleged in plaintiff's complaint.

VI.

Excepting as herein admitted or otherwise alleged defendant denies each and every allegation, matter, and thing set forth in plaintiff's amended complaint.

31 WHEREFORE, defendant prays that plaintiff take nothing by reason of said amended complaint, and that defendant go hence with its costs.

Verification

Served March 10, 1939;

Filed March 13, 1939.

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32 Notice of Motion for setting Case for Jury Trial and Demand that cause be set for trial served March 20, 1939, and filed same day. Order setting case for trial on May 1, 1939, at 10:00 o'clock A. M., dated March 28, 1939.

BILL OF EXCEPTIONS

109 BE IT REMEMBERED, that on the 3rd day of May, 1939, at the hour of 10:00 o'clock A. M. the above entitled matter came on for hearing before the Honorable P. C. Evans, one of the Judges of the above entitled court, sitting with a jury, the respective parties being represented by counsel as follows: For the plaintiff, L. B. Wight; for the defendant Utah Motor Park, Incorporated, Messrs. Badger, Rich & Rich, by H. A. Rich; for the defendant Mountain Fuel Supply Company, a corporation, Ingebretsen, Ray, Rawlins & Christensen and Joseph S. Jones, by Mr. Jones.

110 Stipulated in open court that objections and exceptions and rulings of the court on the evidence apply to both defendants without their being segregated and without exceptions and objections being taken separately.

Opening statement by Mr. Wight, Attorney for the plaintiff: "As already indicated to you,

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this is an action for damages by reason of injuries sustained by reason of an explosion of gas under the floor under a cabin at the Utah Motor Park. The evidence will show, I think that the gas leaked from the pipes, and accumulated under the floor, and exploded, and Mrs. Loos, the plaintiff in this case, who sits here
111 at my left, was standing on the floor. The floor exploded upward with such force that it broke the bones in her feet, the bones in her left foot suffered a compound comminuted fracture. That means that the bones were broken in many pieces. She was taken to the hospital immediately after that and received care there until I think the middle of July, from the 22nd day of January, and then the doctors could no longer save her limb, and she had to suffer the amputation of her leg midway between the knee and the ankle. I think the evidence will show the injury which she has suffered and the alleged cause of the explosion. The explosion was gas. The cause of it was a leak in the pipe, and the accumulation of it underneath the floor of the cabin. That, in brief, will be our case, and the details of the evidence I am not going to burden you with at this time. I would rather have you hear that from the witnesses. And, when we have sub-

mitted our case, I believe you will render a very substantial verdict for her injuries."

Opening statement of defendants reserved.

Direct Examination of S. C. Baldwin, witness for plaintiff, an orthopedic surgeon. He was called to see plaintiff by Dr. Earl F. Wight on February 1, 1938. He examined her and found a fracture of the oscalcis (heel bone) of the left foot, a fracture of the tip of the internal malleolus and the fibula of the left leg and foot. The tip of the tibia was broken. He saw Mrs. Loos nearly every day for the following few months. Her physical condition was very serious. The bones did not knit, and the foot was infected badly. The tissues of the os calcis gradually sluffed out and left a blank there. She was suffering severe pain the greater part of the time. The nerves of the foot were evidently affected. They did everything they could to save the foot and leg and to ease her pain, and to overcome the infection, but it gradually got worse until they had to take the leg off on July 13, 1938. If the foot had been saved, she would not have been able to use it because the os calcis is the supporting bone of the back of the foot and it was gone. (It was stipulated that $250.00 was a reasonable fee for the services performed by Dr. Baldwin to plaintiff. It was also stipu-

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lated that $25.00 was a reasonable charge for a blood transfusion to the donor.) Witness further testified that plaintiff was discharged from the
119 hospital on August 14, 1938. (The defendants stipulated that the sum of $966.28 was a reasonable charge made by the hospital to plaintiff.) In his opinion it would have required consider-
120 able force to have produced the injury which resulted to plaintiff's foot. He examined plaintiff a day or so before the trial. She still had considerable tenderness in the leg which would affect the comfort of wearing an artificial limb. Unless treatment would relieve the tenderness there, the nerve would have to be dissected out
121 up to behind the fibula, which is not particularly serious. The nerve was protected so that it would not form a neuroma. There is no way of protecting it so it would not be sensitive. No neuroma is there now. The nerve all the way up her leg was affected during her sickness. The nerve was not infected, but it was very sensitive. Her pain was all up and down the leg, clear up into her back.

Cross Examination of Dr. S. C. Baldwin:

122 Dr. Baldwin stated that he did not fit Mrs. Loos with an artificial limb before she left Salt Lake. The operation necessary for greater comfort in wearing the artificial limb can be per-

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124 formed with a local anesthetic. It would heal within ten days or two weeks with good luck. A fair fee for such an operation is $100.00, exclusive of hospital expense for about ten days or two weeks.

125 *Direct Examination* of Earl F. Wight, witness for plaintiff, a physician and surgeon. He identified Exhibit "A" as the hospital record of plaintiff. He first saw plaintiff on the 22nd of January, 1938, in the Emergency Hospital. He examined her; her injury was serious and needed hospital care. He took her to the
126 Holy Cross Hospital. She was in a state of shock, had superficial injury or bruise to both legs. The skin on the ankle of the left leg was torn away. She was given a general anesthetic. The heel bone of her left leg had a comminuted fracture. The flesh was torn away over the left heel as though something had struck against it, and the tendons were exposed. It was dirty and
127 bleeding profusely. He explained that Exhibit "B" was a side view of both legs. The X-ray showed that the right heel bone had been broken. Exhibit "C", an X-ray of both legs from the front shows the two feet apparently normal ex-

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cept the left one. Exhibit "D", an X-ray of the left leg in the region of the knee, pointing down
128 towards the heel, showed the fragments of bone in the heel. All doctors who saw her wrote on the hospital record, Exhibit "A", there being Dr. Baldwin, Dr. Claude Shields, Dr. Ralph Pendleton and Dr. L. N. Osman. The first record is
129 of the operation performed on the 22nd of January. When she entered the hospital her pulse
130 was very rapid, her blood pressure had fallen and she was suffering severe pain. The wound was irrigated with two or three gallons of iodine solution, all of the frayed flesh, that which had been bruised or which might die and decay, was cut away, and a carrol tube was inserted and a
131 Dakins solution was run through it constantly for the first week. She was given prophylactic injections of antitoxin for tetanus and infec-
132 tion. From January 22nd to February 1st, her condition was toxic, absorbing poison and toxins from infection in her leg. By February 1st, the wound seemed a little better. Her temperature
133 had gone down. Dr. Baldwin operated to get the bones in position. She was given a blood transfusion on January 27th. Her blood was not able to fight off the infection. The second transfusion was given on February 1st. As a result of the pain and absorption of toxin, she had a temperature, couldn't eat, lost weight, had

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changes in the muscles of the bowel and heart which made them work weakly. She was at no
134 time free from severe pain and was given mor-
138 phine to control it. She had hallucinations caused by toxemia and perhaps pain. He examined the stump of her leg within the last twenty-four hours. It has healed well, but there is a nerve in it which causes her trouble, which is called a neuroma. It cas be cured by taking the nerve out and
139 temporarily relieved by injecting the nerve. The effect of the poisoning on her system may or
140 not be lasting. An X-ray taken on February 26 (Exhibit "C") showed infection spreading into the leg bone and decalcification of the bone around the ankle. An X-ray taken April 8th (Exhibit "F") showed the soft tissues around the leg becoming dense, and the heel bone practically absorbed.

Redirect Examination of Dr. Earl F. Wight:

145 Exhibit "A", the hospital record, was offered. The court stated that counsel for defenddants might thereafter have time to read the record and to make objections thereto.

146 *Direct Examination* of Lester E. Loos, witness for plaintiff:

Witness testified that he is the husband of plaintiff. That he was in Salt Lake in Janu-

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ary of 1938, occupying cabin 403 in the Utah Motor Parks. On January 22nd, he had been outside cleaning the car in front of the cabin there was an explosion in the cabin. He had been in and out of the cabin several times, wip-
147 ing off the car. The wall where the door was was blown out. Plaintiff was lying under the timbers inside of the cabin. He tried to pick her up. Her foot was stuck. He held her, and another
148 man helped get her out. She was in a daze. Mr. Loos stated that he went to the cabin to try to salvage some of their belongings. Someone came over to him and said, "Your wife's foot is bleeding." He went back and noticed that she had a cut around the ankle. He stated that there was no odor of gas. The building itself was burning. It was about 3 or 4 feet away from where Mrs. Loos was. The roof was blown down to one side. He couldn't tell just what timbers were on plaintiff. He stated that
149 the cabin consisted of a kitchen, a combined living and bedroom, and a bathroom. There was another apartment in the east end of the building. Plaintiff was taken to the Emergency Hospital. He called Dr. Wight, who came and examined plaintiff. She was taken to the Holy Cross Hospital. He remained in Salt Lake about five of six weeks; then went back to California where his work is. During the first

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150 five weeks he remained in Salt Lake and saw plaintiff frequently. After the accident she wasn't able to eat well; she was in a state of shock; she was nervous; she weighed 120 pounds when she entered the hospital and on the day they had to take her leg off she weighed 80 pounds. She
151 was out of her mind from pain. She said funny things; she couldn't tell one day from another; that condition has entirely subsided. He purchased her an artificial limb. She can wear it but complains of pain. The ankle of the right leg is still black and blue. She has had an artificial limb for three or four months, but has not been able to use it very well. She has endeavored to use it. She complained of pain, of
152 stings and jumps. Prior to the accident, plaintiff was a great hiker. She could walk several miles, and did so frequently. At night, after work, plaintiff would walk with him to the movies. While at the Motor Park we walked several times to town and back. He stated that he is a salesman. They have no children. Plaintiff traveled with him. He was on one of his trips when he came here in January. (It was
156 stipulated that the value of the plaintiff's property lost as a result of the explosion was $149.65.)

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Cross Examination of Lester E. Loos:

157 Witness testified that he and plaintiff went down and looked at the cabin before they rented it. They were shown what the facilities were. There was a gas range in the kitchen and a gas
158 heater. The gas range had to be lighted with a match. There was a gas appliance sitting on the floor. The man who showed them the cabin lit the pilot light and explained how to turn the handle to get the gas to ignite from the light. Plaintiff asked the attendant whether it was safe, and he assured her that it was and they rented the cabin. They continued to occupy it from the 15th of January until the time of the accident. In the meantime they operated the furnace and the gas range. (Mr. Rich offered
159 Exhibits "I" and "J"). They cooked their breakfast and supper and engaged in housekeeping and spent a few evenings there.

160 *Redirect Examination* of Lester E. Loos:

161 After the explosion, the walls blew out from the bottom, and in the front end of our particular room the ceiling had fallen. The roof and the partition were burning. Sometime
162 later he examined the furnace which was dug up. It was blown inward. It was his first idea that

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perhaps the furnace had blown up. It was a gas
163 furnace set in the ground under the floor with just earth around it. The earth had been filled in right up snug to the furnace. The heating unit of the furnace was inside the casing of galvanized iron or tin. The furnace was bent
164 inward, quite a deep dent, on at least three sides. The casing was square. He stated that he had not observed any odor of gas before the explosion. He observed a ventilator in the foundation at the west end of the building. On the day of
165 the explosion he didn't notice whether it was opened or closed, but it was open when he rented the cabin. The witness believed that he made a statement to the effect that there was an old piece of cardboard over the opening. He didn't notice a window in the other end of the foundation. The openings were about four inches high and possibly eight inches in length. He believed that the hole extended down into the concrete
166 an inch or two above the soil which would make the opening about four inches high. The witness
167 was shown a picture marked Exhibit "K", a page of the SALT LAKE TRIBUNE, dated January 23, 1938. A number on the side of the cabin shown in the picture is 403 and the name, "Walls of Jericho", which was the name of the cabin which he was occupying. The picture shows the condition of the cabin after the explosion.

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168 *Recross Examination* of Lester E. Loos:

169 The furunace was a regular floor furnace with a grill over the top. It was the first one he had ever seen like that.

170 *Direct examination* of Alice Loos, Plaintiff:

Plaintiff testified that she was injured in an accident explosion on the 22nd day of January, 1938, and at that time she was occupying cabin No. 403 in the Utah Motor Park, "Walls of Jericho"'. They had been in the cabin just one week, and had paid the rent in advance for
171 another week. Her health was perfect up to the time of the accident. While in Salt Lake City she had gone with her husband most every day. She rode in the car to where he was going and then got out and walked while he was making his calls. The explosion occured about 5:30 P. M.; she had just come out of the bathroom, she smelled the odor of gas and looked down to see if the pilot light was lighted; it was, and then the explosion happened. The only thing she
172 remembers is that she went whirling around. The next thing she remembers she was out on the lawn on a mattress. At first she didn't feel
173 so much plain; just felt dazed. She was then taken to the Emergency Hospital and transferred to the Holy Cross Hospital. She began to experience

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pain when she got to the hospital and it kept getting worse all the time. She was at the hospital from January 22, to Auguust 14. She felt pain all the time in her leg and foot. It was
174 mostly in the left leg, but both legs pained her. The severe pains were in her ankle and left leg. She was delirious most of the time from pain. The pain was excruciating, and the pain con-
175 tinued all the time she was there up to the time of the operation . She believes she had two blood transfusions. Since the amputation, she had a lot of pain in the stump, also pain in her back and her ankle on her right foot bothers her. She has an artificial limb, but cant use it very much because it hurts her. In preparing her leg for the use of the artificial leg they had to bandage her stump with elastic to reduce it so that they could make the artificial leg, otherwise it would have to be made a lot larger than the other leg, which they had to do in about six months. They said they would make it exactly
176 the same size as her other leg. She stated that she was not wearing it because it hurt her, and she didn't know why it hurt until she talked with Dr. Baldwin. Prior to the accident she always did a lot of walking, rode a bicycle, and rode horseback. Her weight was about 118 pounds before she went to the hospital. At the time of the operation, she weighed 80 pounds. At the time of the trial she weighed 110 pounds.

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She accompanied her husband on his trips and sometimes they stayed at auto camps, and when they did she did the cooking. They have no children.

177 *Cross Examination* of plaintiff:

She stated that she started to gain about three months after she left the hospital. She now weighs 110 pounds.

Direct Examination of William Dawson, a witness for plaintiff:

178 Dawson testified that he lived at the Motor Park at the time of the explosion and had lived there since the preceding December. There was one cabin between the cabin in which he lived and cabin 403. During the time he lived there, there
179 was a gas leak in his cabin in the furnace prior to the explosion. He never observed anything unusual in passing cabin 403. He only observed the odor of gas in his own cabin and in the Swagers, which was just north of 403. The leak was fixed
180 in his cabin but he still noticed the odor of gas.
181 He reported the smell of gas before it was fixed; he still smelled it after it was fixed but didn't report it thereafter. As near as he could remember he noticed it up until the time of the explosion.

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Cross-Examination of William Dawson:

181 Dawson testified that the character of the leak
182 found in his apartment was not explained to him. They tore the floor up and go down in there and did something. Whether the persons who did the work were from the gas company he did not know. There were a floor furnace and a range in his
183 apartment which he operated himself. The leak was fixed sometime in January. The odor was right in his cabin. He made no tests to determine
184 where the odor came from. When he noticed the odor he reported it to the office and they sent down and notified him that it was fixed, but it did not entirely eliminate the odor. He didn't notify them after that of any trouble.

Re-Direct Examination of William Dawson:

185 He observed the odor of gas in Swager's cottage which was the first cabin north of 403.

Re-Cross Examination of William Dawson:

185 The cabins are connected with a roof. He oc-
186 cupied the end cottage on the south. There was a
187 cottage just north of his, then 403, and then Swager's. Mrs. Swager stated that she noticed the odor of gas and he knew it was noticeable then. That
188 was one week after he moved in. He didn't know where the odor came from in the Swager cabin.

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He hasn't been around gas much. He had a gas heated house a while before he moved to the Motor
189 Park but it was always in perfect working order. He did not know whether or not it would be possible to get a gas odor from gas appliances if they were in perfect working order. He met Mr. and
191 Mrs. Bussell after the explosion but not before. He occupied a cabin at the motor park from the latter part of December until around the first part of April.

Direct Examination of Harvey B. Bussell, a
192 witness for Plaintiff:

Mr. Bussell stated that he is rated as a letter carrier although he drives the truck. He lived at the Utah Motor Park from about October 15, 1937, Until the first of May, 1938. He remembered the occasion when the explosion occurred and apartment 403 destroyed. He had noticed the odor of
193 gas prior to the explosion. The first time he noticed it he drove into the garage between the Wheeler cottage and the one he occupied. It was either the 2nd or 3rd of January. The next time he noticed it was on the 17th. We notified them both times. The notice was given to Mr. Sheets at the office. He noticed the odor of gas in his apartment a good bit of the time but didn't pay any attention to it.

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194 He was working the day the explosion occurred. The explosion caused considerable damage in his apartment. The north wall was moved out about six inches at the bottom. In the kitchen
195 there was a hole blown in the wall; the table and seats for the breakfast nook were torn loose. The south wall of the Loos-Wheeler cabin was blown out into the garage and was laying flat in the driveway. He paid no attention to the ventilators in the Loos and Wheeler cabins.

196 *Cross-Examination* of Harvey B. Bussell.

He testified that he was in the Wheeler cottage prior to the time of the explosion; that in the Wheeler cottage there was a floor furnace and a
197 little cooking stove, three plates on top with an oven underneath. He smelled the odor of gas in his cabin now and then but not bad. He had smelled it more in the garage, but if there was a little breeze blowing, it was not noticeable. He and his wife were together when he smelled the gas. He didn't notify the Company. He told his wife to do it.

199 *Re-Direct Examination* of Harvey B. Bussell.

He testified that he couldn't say exactly where Mr. Wheeler is now. He didn't know of his own knowledge whether Mr. Wheeler was in Salt Lake or not. He went to the place where Wheelers did

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200 live but they had moved away. On the two days he observed the smell of gas he told his wife to notify the office. The first time he sent her, the next time he just left it up to her to tell.

Direct Examination of Rosa Louise Bussell, witness for plaintiff:

She testified that she was the wife of Harvey B. Bussell. She was living at the Utah Motor
201 Park in January of 1938 and had lived there quite a while. They were living there on the 22nd of
202 January, 1938. She testified that she recalled the explosion in the apartment occupied by Mr. and Mrs. Loos. She was living in "N. A. C.", the name of the cabin. She pointed to the diagram on the blackboard, identifying the cabin in which she lived. She was present in her apartment when the explosion occurred. The explosion shook things up pretty badly. Prior to the explosion she had observed the odor of gas, not in her apartment, but in the driveway between her apartment and the Wheeler apartment. She noticed it first on the 2nd or 3rd of January. The odor was very dis-
203 tinct. She reported it to Mr. Sheets. He told her he would take care of it. Nothing was done about it. Thereafter, she noticed the odor of gas —"well, mostly—most of the time. The really pronounced odor was the 17th." She reported it on that date to Mr. Sheets at the office. There was

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always a little odor but — "most — two times— it
204 was noticed real bad—was the 2nd and 3rd and 17th." After she notified them on the 17th nothing was done about it. The explosion occurred on the 22nd. She was in her apartment at the time the explosion occurred. It tore the kitchen, the little table and the two seats completely away from the wall and blew a big hole underneath. The whole south wall of the Loos and Wheeler apartments had come over against hers and was laying flat. She was lying on the bed reading at the time of
205 the explosion and was thrown completely off the bed and knocked unconscious and the chandelier came down and hit her on the forehead, knocking her out. When she became conscious she made the observations concerning which she testified. She testified that she didn't know where the Wheelers were. She testified that she didn't know where Mr. and Mrs. Ford were and that she didn't really look for them.

206 *Cross-Examination* of Mrs. Bussell:

She testified that she had not been out looking for witnesses in this case. She noticed an odor of gas on the 2nd and 3rd of January in the garage between her cabin and the Wheeler's. It was
208 about 12 o'clock just after she had returned from
209 Sunday School. It was on Sunday. Mr. Lindholm was not there, she believed it was Mr. Sheets. It

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was about Sunday noon. It was with Mr. Sheets she talked and not with Mr. Lindholm. It was in the garage between the two places; most of the odor was coming by Loos'. She didn't go along the garage smelling to see where the odor was coming from, whether it was from the Wheeler's or from the Loos's, but it was in the driveway be-
210 tween her cabin and the Wheeler's. Her husband told her to go up to the office and notify them and
211 she did. She didn't make an investigation to determine where the gas was coming from. "We just drove in the garage and I said, 'I smell a funny odor', I says 'it smells like gas, because I smelled gas before, but I don't exactly know where it was coming from but I knew it was gas'." She
212 didn't know where the gas was coming from. The reason she said that nothing was done about it was because the odor was still there. The odor was different on the 17th of January from that which she smelled on the 2nd and 3rd. It was a pronounced odor, the same strong odor every time.
215 There was less odor of gas between those times, how much less, she couldn't say. She stated that she didn't remember whether in her previous testi-
218 mony she had testified that she had seen Mr. Lindholm a few days after the accident occurred. When asked whether she had any interest in this subject matter, she testified, "Yes, I am trying to help people." The odor was noticed in the same place on the 17th as it was on the 2nd and 3rd. In ans-

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wer to the question, "Do you know whether anything was done about it?" the witness said, "Well, there was some boy there who was sent out to
224 look at it, but he didn't do nothing." She was not in the Wheeler cottage when the boy was there. She testified that she did not know what the officials of the Utah Motor Park did about it.

226 *Direct Examination* of Clara Tissot, witness for plaintiff:

Witness testified that on the 22nd day of January, 1938, she lived at the Utah Motor Park in cabin No. 203, which was to the east and directly opposite from the Wheeler's. She had been living there from the first of November. During that time she observed the odor of gas. She didn't remember when she observed it, but she observed it quite often. She observed the odor in the kitchen and also outside. She didn't ever go by the Wheel-
227 er apartment in leaving her apartment, she went north out of a door on the east side of her cabin. She was at home at the time of the explosion. She didn't know whether she had observed the odor of gas before the explosion, but she guessed the ex-
228 plosion recalled to her the fact that she had observed the odor of gas. She doesn't remember whether she observed gas immediately before the 22nd of January or not. She was out quite a bit and didn't pay much attention. When asked if she

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could tell anything about how frequently she observed gas she said that she used to observe it every day. She didn't seem to notice it at first. She was there a month or so before she started
229 to notice it. She said she went to Mr. Sheets and said, "The gas is smelling something terrible over there and I wish you would fix it," and he said "OK, I will have it all fixed." About a couple of days later "they did a lot of stuff with the pipe and I don't know what they did," they made an investigation and took up the pipes. The pipes were on the inside. The pipes were exposed before they fixed them and they fixed them so that they were not exposed. She still noticed the odor of
230 gas, especially on the outside. The agents and servants of the Motor Park never did come to the apartment.

Cross-Examination of Clara Tissot:

The pipes in her cabin were fixed about a month or so before the explosion occurred. She testified that someone was in her cabin all of the time doing something. They had the stove out in the middle of the room half of the time. She didn't
232 remember that at a previous trial she testified that the only time anyone came in her apartment was to fix a kitchen range.

The testimony at the previous trial was read to her; she acknowledged it as her testimony. In

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235 that testimony she stated that she had noticed the odor of gas a couple of times to be sure, once before and once after the explosion.

Direct Examination of John Swager, a witness for plaintiff:

237 He testified that he was living at the Utah Motor Park on the 22nd of January, 1938. He didn't know Mr. Loos nor Mr. Bussell, but he knew Mr. Dawson. He was in Dawson's cabin at 238 the time of the explosion. He heard a thud, dashed out of the cabin and saw the Loos cabin with the walls blown down. He lived there from Thanksgiving of 1937 until May of 1938. Previous to the 22nd of January, 1938, he observed the odor of 239 gas in his cabin. He did not observe it when he was outside of his cabin. He didn't do anything 240 about it when he observed the odor of gas. It happened to be at night and he left the window open. He didn't report it to the office

Cross-Examination of Swager, a witness for plaintiff.

242 He examined the gas appliances in his own cabin but at the time he didn't know anything about gas. He saw that the nobs were turned off and saw that the pilot light was burning. He didn't know how to test whether any of the casings were wearing or needed replacing. He lit a match

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in the oven to see if the gas was coming from there. He didn't know whether it came from any of the other appliances or not.

Redirect Examination of Swager:

243 After the explosion he rushed over to the Loos cabin. Mr. Loos was just starting to bring Mrs. Loos out and we helped him. Two of us carried her out and Dawson got a seat out of his car and we laid her on that on a blanket and rushed back to see whether anyone else was in the cabin. Mrs. Loos seemed to be in quite some pain but he didn't pay particular attention to her. He knew her leg was bleeding. The ambulance came and took her
244 away. The gas was burning when he got to the cabin, in the middle of the cabin toward the rear.

Redirect Examination of Lester E. Loos:

244 Mr. Loos stated that he did not know where Mr. and Mrs. Wheeler were. He stated that he was informed that they were in Los Angeles; he stated that he had made an effort to locate Mr. and Mrs. Ford. He stated that he believed they were in Seattle. He stated that he was not sure whether
245 Mrs. Loos was entirely reconciled to the loss of her limb. He stated that he had observed his wife constantly; that occassionally she had jumping pains in the stump. She is not happy. She grieves a lot, particularly at night and for three or four

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246 months after she came out of the hospital he would wake up at night and find her crying.

Cross-Examination of Lester E. Loos:

He stated that he had tried to find the Wheelers and the Fords but had not been able to locate them; that he did not have their addresses either in Los Angeles or Seattle.

Direct Examination of George Lindholm, a witness for plaintiff:

248 He stated that he was the Manager of Utah Motor Park and had been for eleven years. The system for furnishing gas was changed some time ago so that the gas goes through two meters; the gas for cooking goes through the domestic meter and the gas for heating goes through the industrial meter. The industrial meter is in the office building, the other is at the entrance to the park. On the 22nd of January, 1938, we used gas in 113 out
249 of 125 cabins. All of the apartments in the vicinity of the Loos, Wheeler, Swager, Bussell and Dawson cabins have gas.

250 Any time we had a leak in the gas line or any leak was reported to us by any tenant in the park or any employee had it reported to him, they had instructions to report it to the office and call the gas company and we always did that.

"Q .Mr. Lindholm, I will ask you whether or not it was necessary to make repairs to that system of pipes conducting gas to the various apartments?

A. Well, any time we had a leak in the gas line, or any leak was reported to us by any tenant in the Park, or any employee had it reported to him, they had instructions to report it to the office, and call the Gas Company, and we always did that.

Q. And you always did that?

A. There was no charge for the service, so there was no reason why we should not call them.

THE COURT: You reported where?

A. To the gas company, and they sent a service man out to take care of it.

Q. Do you recall any complaints, or any reports that gas was leaking from the pipes prior to the 22nd day of January, 1938?

A. Yes, I do.

Q. And in those cases you followed your usual custom and notified the gas company?

A. Always notified the gas company.

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Q. And did their plumbers come down and make the repairs?

A. Well, they have a service department, and they send a service man there and he makes the repairs, unless it is a broken pipe which has to be replaced, or defective equipment, and in that case he notifies us and we would have to engage somebody to replace them."

"Q. Do you recall a complaint made by Mrs. Bussell on the 3rd day of January, 1938?

A. No sir; I do not.

Q. Were you at the office at that time?

A. Yes, I was at the office on the 3rd of January.

Q. Did you keep any record of those complaints?

A. No, I didn't keep any record at all at that time.

Q. If one was made you just followed your usual custom and called up the gas company?

A. We called the gas company.

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Q. And they took care of it?

A. They took care of it. If they didn't take care of it within a certain time, we would call them again. Sometimes they couldn't take care of it immediately, and we would have to wait several hours."

252 *Cross Examination* of Mr. Lindholm:

Mr. Lindholm testified that he was in the office of the Utah Motor Park on January 3rd, 1938, he was there until 1:00 P. M. He did not report to the gas company that there was a leak in the vicinity of the Loos or Bussell cabins. He didn't recollect ever having received a report about it.

253 "A. I don't recollect ever having a report of it. There was reports of odors of gas. I smell gas around a great many cottages myself, and I think any place gas is used you will smell it, and people think because there is an odor of gas there is a leak. It is not necessarily a leak, because you can go in any cottage any time and smell gas; at least I can.

Q. Each time you reported to the gas company that you had been notified of a leak in the gas appliance, or any gas leak, did the gas company come down and repair it?

A. Well, they have taken care of greasing

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valves and little items. If there is any major repair we would have to engage a plumber to make a replacement, but they take care of practically, I would say ninety-eight percent of the calls, anyway.

Q. And those calls with respect to leaks in appliances?

A. Leaks in appliances, yes, sir.

Q. And they repaired them each time they were notified of it?

A. Yes, sir."

254 Mr. Sheets is not now employed by Utah Motor Parks, he was employed by it on January 22, 1938. Mr. Sheets and his wife lived in the Park and were always on duty there, but he, Lindholm, would report in the morning and stay there on Sunday until 1:00 P. M. and every holiday. Mr. Sheets was never in the offiice on Sunday until after 1:00 P. M. He had no conversation with Mrs.
255 Bussell. When asked what instructions were given to employees of the Motor Park with reference to gas leaks. Mr. Lindholm stated:

"A. All employees, both maids and the boys that worked around the grounds and Mr. Sheets have always been told in case of a gas leak, or re-

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port of a gas leak, to call the gas company, and that has always been done. There has never been any charge for that service and there was no reason why we shouldn't call them. I have always told them that leaks do not fix themselves."

Most leaks are on the valves. There are a great many two plate burners there and also ranges. The leaks develop around the valves and that is where most of the leaks are. Those leaks develop from just wear and tear. To stop leaks in valves, the usual procedure is to grease them; if the leak is not stopped by greasing, a new one
256 is put in. The gas plates and ranges are all above ground. On most ranges there is a pilot light; when the pilot goes out a small stream of gas escapes. The odor is offensive and is soon reported. Pilot lights in the furnaces occasionally go out
257 and that causes an odor. There is odor from the operation of automobiles in the park. He has several times found gas turned on full force and not burning in the cottages. He did not know who turned it on.

258 *Redirect Examination* of Lindholm:

"Q. Mr. Lindholm, when the odor of gas was reported did you first make an investigation to determine whether the leak was from the appliance, or did you at once notify the gas company.

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259 A. Will you refer to any specific instances, or in all cases?

Q. Well, I think you said on cross-examination by Mr. Rich that you did repair some leaks and appliances. So I asked this question.

A. Well, I think in most cases we would go over and see if we can take care of it ourselves, but that is not always true. If someone says there is a bad odor of gas we would call the gas company immediately."

He testified that he remembered the 2nd day of January, 1938; it was on a Sunday. Mr. Sheets should have reported at 1:00 as was his custom on Sunday. His recollection of that was because that was Mr. Sheets' custom. Sheets had been work-
260 ing for the company then for about a year and eight months. He was in the employ of the company on the 17th of January.

Recross-Examination of Lindholm:

He testified that he was not here at the time of the explosion. He left Salt Lake on the 16th of January and did not return until March.

In the absence of the jury, counsel for plaintiff asked leave to file a demand for the production of evidence served upon both defendants on

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the 27th day of April, 1939, such demand was as follows:

"'To the said defendants and to Ingebretsen, Ray, Rawlins & Christensen, and Badger, Rich & Rich, their attorneys:

'Take notice, that the plaintiff demands of said defendants an inspection of the pipes, unions and connections used in supplying gas to Apartment No. 403 (and
262 the apartment adjacent thereto), on January 22nd, 1938, and that part of the partition around and immediately above the hole through said partition through which said pipes were placed, and in particular the wood column, approximately 1½ by 2½ inches, which was directly above said pipe opening, and that the same be produced at the trial of said cause for use by the plaintiff as evidence in said cause.

'By reference to said apartment No. 403 is meant the apartment in which plaintiff was injured as alleged in plaintiff's amended complaint herein.'

"I want to state into the record that after the service of that notice, Mr. Arnold Rich called me and told me that the apartment had been burned and entirely remov-

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ed. He tells me that since—and this I think
263 I should state for his benefit—that he intended, and his recollection is that he told me that the pipes were there and I was welcome to see them.

"MR. RICH: That certain pipes were there.

"MR. WIGHT: Certain pipes were there. Now at my further request, they have brought into court this morning, and I have here present, one piece of pipe. I think it is inch and a quarter, isn't it, or inch pipe? Inch pipe capped at one end, one piece about five and one-half inches long, threaded at one end, and cut off at the other; one four inch nipple screwed into an elbow, the pipe broken, and the threaded part of the pipe remaining in the other side of the nipple or the other side of the elbow, and another elbow from which the pipe has been removed at one end, and the threaded portion broken off in the other. My information is that the pipe that was removed and placed in the hands of Mr. Slusser, whose testimony I sought for the purpose of proving the location of this pipe, after I had been informed the evidence could not be produced by the defendants, or either of them.

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"Now, it may be stipulated that Mr. Slusser appeared, and that he was represented by Mr. Rice, the Assistant Attorney General, and that he claimed the privilege by reason of his office under Section 104-49-3 Sub. Section 5, and Section 76-4-14; that the court sustained the objection to that testimony."

264 Both defendants objected to the competency of the evidence. The Court stated that he would not pass upon the competency of the evidence but stated that the witness was entitled to claim the privilege. Counsel for Utah Motor Park stated that it could not identify the pipe referred to as being in any way involved in the accident in the case. Counsel for plaintiff took exception to the
266 failure of the defendant to produce the evidence. Counsel for Mountain Fuel Supply Company stated that it had nothing to do with the pipe and had never had it in its possession.

Plaintiff rests.

Motion of Defendant, Mountain Fuel Supply Company for a non-suit upon the following grounds:

"1. That the evidence introduced by
267 the plaintiff is insufficient to warrant a ver-

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dict by the jury in this case against the defendant, Mountain Fuel Supply Company.

2. That there is no evidence in this case of any negligence whatsoever on the part of the defendant Mountain Fuel Supply Company.

3. That the plaintiff has not proved, and there is no evidence that the defendant, Mountain Fuel Supply Company installed the gas appliances referred to in the evidence, nor is there any evidence that the defendant, Mountain Fuel Supply Company installed the gas system which supplied the gas to the cabins of the defendant, Utah Motor Park Company; nor is there any evidence that the defendant, Mountain Fuel Supply Company had any notice whatsoever of any conditions existing on the premises of the defendant Utah Motor Park which would give rise to a duty on its part to remedy or change the system or to refuse to deliver gas to the defendant Utah Motor Park.

4. That there is no evidence in this case that the defendant Mountain Fuel Supply Company had any control, by way of supervision, or otherwise, over the gas

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system on the premises of the defendant Utah Motor Park.

5. That there is no evidence in this case that the defendant, Mountain Fuel Supply Company furnished any of the material or any of the appliances which were used in connection with the gas system at the Utah Motor Park.

6. That there is no evidence in the record which would show that the defend-
268 ant Mountain Fuel Supply Company owed any responsibility whatsoever to supervise or inspect the gas system on the premises of the defendant, Utah Motor Park, and it affirmatively appears from the evidence that the gas appliances and the gas system on the premises of the defendant Utah Motor Park were in the control of the defendant Utah Motor Park and its tenants, and that the defendant Mountain Fuel Supply Company had no control over them or any part of them.''

Motion for non-suit by defendant Utah Motor Park, on the following grounds:

'' . . . that the plaintiff has failed to establish any negligence, as alleged in the complaint, of the defendant Utah Motor

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Park, which proximately caused or contributed to the accident and injury in this case."

269 Entered order that the motion of the defendant, Mountain Fuel Supply Company for a non-suit is denied. Entered order that the motion of the defendant, Utah Motor Park, Incorporated, for a non-suit is denied. (May 5, 1939.)

269 to 271 (Opening statement by Mr. Arnold Rich.)

Direct Examination of Heber Sheets, a witness for defendants.

Mr. Sheets testified that he is a service station operator. He was employed by Utah Motor Park in January of 1938, as assistant manager. He left the Utah Motor Park in the fall of 1938. He had no conversation with Mrs. Bussell with reference to any odor of gas in or about the Wheeler cottage or Bussell cottage in the month of January, 1938. She didn't report to him any odor of
272 gas in or about those cabins. He went to work on Sundays in January, 1938, at one o'clock P. M., never before one o'clock. He did not call the gas company pursuant to any conversation with Mrs.
273 Bussell. Other than on Sundays he was on duty all of the time. Miss Graham, now Mrs. Adams, the housekeeper, was also at the park; so were Mr. Ship and Mr. Lindholm. During the month

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of March he was near the Bussell and Wheeler cabins three or four times a day. Some of the cottages in that vicinity were rented to transients. In renting them he would go into the cottages.

274 He did not observe an odor of gas in or about the Wheeler or Bussell or Loos cottages between January 1st and the date of the accident. He did not call the gas company with reference to any gas leak in or about those cottages.

"Q. Did you, during the month of January, prior to the date of the accident, call the Gas Company with reference to any gas leak in or about these cottages that I have mentioned, the Bussell, Wheeler or Loos cottages?

A. No sir, I did not.

Q. What were your instructions, Mr. Sheets, from Mr. Lindholm, with reference to any gas odors or reported gas leaks, what were you supposed to do?

A. Well, I had explicit instructions to notify the Gas Company at once.

274 Q. In the event any leaks were reported to you?

A. Yes.

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Q. Did you make an investigation first to determine that there was a leak?

A. Yes, we did that.

Q. And then would call the Gas Company?

A. Would call the Gas Company.

Q. And none was reported to you during this period of time in question?

275 A. No sir."

Cross Examination of Mr. Heber Sheets:

He did not recollect calling the gas company with respect to a leak in any other gas pipe during that period. He did not keep a memorandum of the calls he made to the gas company. He thought the gas company did. He knows Mrs. Bussell. He had no conversation with her. He would see her outside her cottage as he was going by; he went by her cottage three or four times a day. He didn't smell the odor of gas in that vicinity between January
276 first and January 22nd. He is familiar with the odor of gas. He stated that they had to report any odor of gas. So far as he knew, there were no leaks in any of the fixtures in that vicinity. When the odor of gas was reported, the park employees would go and see if it were a gas leak and if it

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were, we would notify the gas company. He let the tenants make their own complaints and if they made a complaint, they investigated it. They were always on the lookout for anything as they worked around the court. His duties kept him in
277 the office for a little while in the mornings until Mr. Lindholm got there and then he would work around the grounds. The last Sunday in January and through February he worked in the park Sunday mornings. Mr. Lindholm was gone then. While Mr. Lindholm was there he would go over to the office early in the morning and open it up. Mr. Lindholm would arrive between 8:00 and 9:00 and then he (Sheets), would have the rest of the morning off until one o'clock. After he opened the office up, he and his wife would leave the park. Never at any time during the winter, when Mr. Lindholm was there, would he arrive earlier in the afternoon than five minutes before one. There
278 was no regularity about the frequency of calls to the gas company. Sometimes it would go a week, two weeks, three weeks, a month without any calls. Other times there would be one or two a day. Leaks were more frequent in the winter than in the summer. He couldn't recall whether or not in the winter of 1937-8 a month elapsed without having reported a leak. He couldn't recall the exact number of days elapsing, but it had gone for a long period of time when no leaks were re-

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ported at all. He recalled the month of January very well.

280 "Q. How frequently would you smell gas about the place?

A. Well, as I say, you might have one or two a day, and then we wouldn't have an occasion, or there would be no odor at all for a long time.

Q. Can you give me any estimate at all, sometimes there would be one or two a day, you say?

A. Yes.

Q. Then sometimes it would go over a considerable period?

A. Yes.

Q. But do you recall any time during the winter when it went twenty-two or twenty-three days without the odor of gas being distinguishable, except in the month of January, 1938?

A. No sir, I can't.

Q. Who would you talk to when you would call the gas company, do you know?

281 A. We would phone the gas company number and ask for the service department.

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Q. And when you would report a leak they came down directly to fix it?

A. Yes."

Redirect Examination of Heber Sheets:

During the summer the heaters naturally were all turned off. There was no need for them and not being used there would be no occasion for any leaks. The leaks would generally be from appliances like the range. The handles that turn on the jets would become loose. On the floor furnaces the cocks would work loose from use and cause an odor of gas.

Recross Examination of Mr. Sheets:

282 "Q. Then you had more trouble with these furnaces under the cottages than you had with the stoves?

A. Oh no. The ranges naturally had a pilot light on them, too. Most of them were automatic gas ranges, and sometimes the pilot light on the range would go out, and cause a slight odor of gas.

Q. Well, you didn't call the Gas Company to come and light the pilot light, did you?

A. Not to light the pilot light, no, but any of the fixtures.

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Q. Now, we are talking about the trouble for which you called the Gas Company?

A. Yes.

Q. So that there was no trouble, as far as the Gas Company was concerned, when the automatic pilot went out; that you took care of yourselves?

A. Yes, that we took care of ourselves.

Q. Let us start from there and confine ourselves to something else than the extinguishment of the pilot light. You did have more trouble with the gas furnaces in the winter time than you had with the stoves?

283 A. I don't know about that. They were both being used about the same.

Q. You have no judgment as to which caused the more trouble.

A. No, I wouldn't say I had."

Direct Examination of Ivy Graham Adams, witness for Defendants.

Witness testified that she is a maid and housewife; that she was employed by the Utah Motor Park during January of 1938 as housekeeper. As

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283a housekeeper she had to see that everything was run correctly, to check on the girls, to see that the cottages were kept clean and to take care of complaints. The housekeeper oversees everything. The maid has her daily duties and she cleans up a certain number of cottages. She recalls the period from January first to the date of the explo-
284 sion. She took clean linen to the Wheeler cottage once a week, on Mondays; she did not go into that cottage except with linen. She took linen to the Loos cottage once a week. She was in the Loos cottage on the day of the accident about 2 o'clock in the afternoon. She helped Mrs. Loos make the bed and gave her clean linen. The cabin had been occupied before Mr. and Mrs. Loos took it by other people. When the other people moved out
285 she cleaned the cabin, made the bed, cleaned the floors and bathroom and washbasin. She did not ever at any time observe any odor of gas in or about the Loos cottage during the month of January, 1938. On the day of the accident she was in the Loos cabin. She did not observe an odor of gas. On one occasion the Wheelers had put a can of water on the floor furnace. It was tipped over and doubted the floor furnace pilot light. She lit the pilot light again for the Wheelers. That happened a week or so before the accident, on a Sunday morning. They called her into the cabin at that time. At that time she observed an odor of gas in the Wheeler cottage. Other than on that

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286 occasion, she did not ever observe the odor of gas in or about the Wheeler cottage or the Loos cottage during the month of January, 1938, and prior to the accident.

"Q. Who operated the gas facilities within the Wheeler cottage?

A. I don't know who operated them because I wasn't in there when they turned them off and on, but I would imagine Mrs. Wheeler did because she was there all the time."

No employee of the Motor Park had anything to do with the facilities within the Wheeler cottage. In the Wheeler cottage there was a gas range in the kitchen and a floor furnace in the living room. That was so in each cottage. She
287 had nothing to do with the operation of appliances within the Loos cottage.

Cross Examination of Ivy Graham Adams:

She observed the odor of gas in the Wheeler cottage when the pilot light went out and that was the only time she ever observed an odor of gas there and that was the only time she ever observed an odor of gas in that vicinity. Neither she or any other officer or agent of Motor Park had anything to do with operation of the appliances within Loos cottage.

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288 *Direct Examination* of George Lindholm; witness for defendants:

He stated that he had made a drawing representing the cottages involved in the case, which was marked "Exhibit I". It illustrates the cottage floor plans. The row of cottages from 300 to 307 and from 400 to 407 are all under one roof. The length of the row is 125 feet and the length of the buildings is about 25 feet. The width of the garage is about 8 feet. The buildings are 18 by
289 36 feet. There is a living room, the kitchen is off the living room and the bedroom is off the living room. The width of the kitchen is about 5 or 5½ feet. The drawing is not to scale. There is about 50 feet between one row of cottages and the next
290 row. (Mr. Rich requested the jury to view the premises. Mr. Wight objected and Mr. Rich withdrew his request.) So far as appearances are concerned, the conditions at the park are the same now as they were at the time of the accident. In January, up until he left on his vacation, he was at the Motor Park every day, except on Saturdays when he went to the bank. He was there from 8:00 in the morning until 1:00 or 2:00 in the afternoon and from 4:30 in the afternoon until 6:00 or
291 7:00 or 7:30. On Saturday he left before 12:00 o'clock to get to the bank.

The Bussell, Loos and Wheeler cottages are about 125 or 150 feet from the office. They would

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pass by the office in going in and out from the cottages. In the winter time he only went to the cottages when he would call some of the guests who were wanted on the telephone or when someone would call at the office and ask him to go to a cot-
292 tage. He didn't recall smelling any odor of gas in the vicinity of the Loos, Wheeler or Bussell cottages. He is familiar with the effect of gas on foliage. When gas comes up thru the ground it will kill trees or shrubs or flowers or lawn. In front of the Loos and Wheeler cottages there is a Paul
293 Scarlet Hawthorne, which is still there, and we have Paul Scarlet Climber roses in front and there is the lawn. He saw no effect of gas on any of the foliage. The Loos cottage was occupied before the Looses went into possession. It was vacant before the Looses moved in for six days. He did not observe an odor of gas nor did anyone report an odor of gas to him at that time. He was not aware of any odor of gas in or about those prem-
294 ises before he left on his vacation. There is a vent from the floor furnace to the outside which goes up through a little closet that adjoins the bathroom. There is a vent from the oven of the range to the outside. The only time any of the employees of the motor park operated the appliances in those cottages was when the cottages were first occupied. They would probably light the pilot light if it were not already lighted. But after it was occupied, the tenants took care of the appli-

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ances themselves unless there was something wrong with them and then they were reported to the office. Utah Motor Park had nothing to do
295 with the regulation of the supply of gas to the park.

Cross Examination of Mr. Lindholm:

The pilot lights for the gas furnaces were left burning when the cabins were unoccupied. We could shut off the gas to the floor furnaces. There is a valve for shutting off the gas and also a valve for shutting off the pilot. The meter for the gas used for heating was in the office building. The meter for the gas used for cooking is at the entrance of the Park on State Street.

296 There are approximately 113 connections for cooking at the Utah Motor Park. There would not be that many. At that time about 12 of those cottages had been removed. Cottages 45 to 58 were being removed and the work was under construction. Changes were being made at that time and
297 there may have been some of those cottages in use. The work of taking them out was under way at that time. The work was being done by M. C. Summer. The gas company didn't have anything to do with it nor with reference to removing the ranges and cooking stoves. There are about forty cottages with ranges in them, but sixty had cooking appliances. One hundred thirteen had heating fa-

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cilities. However, cabins 45 to 48 were being remodeled and he couldn't recall whether those heating facilities were in operation or not.

298 There is a steam plant in the office, a gas fired boiler and the office is heated with steam.

"Q. I say, with so many furnaces in operation, the heating facilities for one hundred thirteen apartments, it was impossible to turn off the gas in all of those places in order to make a test at the meter.

Q. In order to make a test, it would be necessary to turn off all the cocks and the pilot lights in order to see whether gas was going through the meter.

MR. RICH: I object to it as being improper cross-examination.

THE COURT: He may answer. I assume it must be preliminary to some other question.

MR. WIGHT: Yes.

299 A. I believe it would be necessary.

MR. RICH: I object to the subject matter as not being proper cross examination.

MR. WIGHT: They have gone into this and

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confined themselves to the particular cottages in this vicinity.

Q. Did you make any test—

MR. WIGHT: I will let the court rule on that question.

THE COURT: He may answer.

Q. But you didn't do that?

A. No sir.

Q. And that was also true with reference to the heating facilities or the cooking equipment?

A. Yes sir."

Cottages 45-58 which were being changed were on the northwest corner on the outside row.
300 They were 150 or 200 feet away from the Loos and Wheeler cabins.

"Q. Now, was the gas conveyed to both furnaces in the Loos-Wheeler building by one pipe?

MR. RICH. Objected to as being wholly incompetent, irrelevant and immaterial, and improper cross examination.

THE COURT: I don't recall he testified to

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anything about the conditions underground there, or the pipes, how the furnaces were fed; I don't recall anything.

MR. RICH: No direct examination with reference to that at all.

THE COURT: I don't recall that he testified to anything as to conditions underground there.

MR. WIGHT: Well, I want to ask that question.

THE COURT: Objection will be sustained."

He didn't recall having called the gas company at any time between the last of December and the time he left the city. Beginning with October, 1937, and from that time until January 15th, there were quite a number of calls to the gas com-
301 pany. He didn't remember any particular calls but in the winter months when all floor furnaces were in operation and quite a number of permanent tenants, there were calls quite often. He didn't recall any reports that came from the vicinity of the Loos-Wheeler cottages. There may have been, but he didn't recall any.

"Q. Did you have anybody whose duty it was to investigate and find out what was wrong when gas was leaking?

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A. Well, I always sent Mr. Sheets out, or in-
302 vestigated myself. In fact, all the employees had instructions, if there were any leaks, to make a report to the office and we would check to find out.

Q. And if there were gas leaks, then you did what?

A. We reported it to the Gas Company, always called the Gas Company.

Q. And after they had made the repairs, did you make investigation to find out whether it was satisfactory?

A. Yes, we would always check up to find out if it was repaired. In fact, the gas man wouldn't leave until it was repaired. He would require us to sign a small slip that he had been there, showing that the repair had been made.

Q. I didn't understand your answer to the other question. Did you personally, or by your employes, make an investigation to find out if the repair was satisfactory?

A. Yes, we did.

Q. And then you signed a paper?

A. They may not have made it right at the

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time, but we usually checked them to see it was all right.

Q. You didn't make the investigation at the time, you say?

A. I say we may not have made it right at the time, may have been busy and couldn't go out right at the time, but we would always check up and see it was repaired.

Q. But you did sign the paper at the time, whether you had made an investigation or not?

A. Yes, we would sign the paper. They would bring it in the office and say the repair had been made, and we would sign it."

303 When he left on the 16th, he left Mr. Sheets at the park in charge. Mr. Rich called the park every day to see that everything was all right. He didn't know anything about the accident until he got back in March. In going through cottages he observed the odor of gas at times when it had not been reported. Reports of odor of gas were made more frequently than odors were found by investigation.

Redirect Examination of Mr. Lindholm:

304 Most of the gas leaks were from appliances,

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gas plates and ranges. Many times the pilot would go out on a range and when the pilot light is out there is a small stream of gas into the cottage. The gas has a very offensive odor. Sometimes in turning off the plates, they wouldn't be turned off entirely and it would cause a leak in the gas plate. The valves get worn and the gas plates wear and have to be greased or replaced. That in a general way is the source of the gas odors which he observed.

Recross Examination of Mr. Lindholm:

There was a four-inch gas vent from the gas furnace up through the partition and out of the roof. The vent took care of all burned fumes but if the floor furnace was not burning and the gas was on it would spread out. There is no danger
305 of monoxide poisoning unless the room is closed up tight and you have an open flame. When the furnace is burning the vent carries off all the fumes and gas. As he understood it, gas does not
306 rise unless it is burning and therefore the gas would spread out under the cottage if the valve was open. He didn't know what caused the acci-
307 dent. He made no investigation after the accident to determine what valves were open and what were not open.

"MR. RICH: I object to that as being im-

proper cross-examination, and the witness has testified he wasn't even here.

THE COURT: Well, his answer is 'No.'

Q. You haven't any information now as to how this accident occurred?

MR. RICH: I object to that as being improper cross-examination, incompetent, irrelevant and immaterial.

THE COURT: Objection is sustained.

MR. WIGHT: I take it that the whole examination by counsel for the defendant has been to determine how this accident occurred; that was the purpose of it.

MR. RICH: The purpose was to present your evidence, it was your purpose to prove how this accident occurred, and it was within our negligence.

MR. WIGHT: But the facts were all within your knowledge.

MR. RICH: Now, let us argue that as a proposition of law. That does not make this proper cross examination of this witness. I simply stand on the court's ruling.

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MR. WIGHT: And the Court has ruled against me?

THE COURT: Yes, the ruling may stand.

Q. (By Mr. Wight) Were you present when any of these gas furnaces were installed?

308 MR. RICH: I object to it as improper cross examination.

THE COURT: The objection will be sustained.

A. Yes I was.

MR. RICH: Just a minute, the court has sustained the objection.

A. Oh, excuse me.

MR. WIGHT: I take it then the answer will have to go out.

THE COURT: Yes."

PLAINTIFF AND DEFENDANTS REST.

Motion by defendant, Mountain Fuel Supply Company for directed verdict in its favor on the following grounds:

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309 "1. That the plaintiff has failed to prove that any negligence whatsoever of the defendant, Mountain Fuel Supply Com-

310 pany, was the proximate cause or any cause of the plaintiff's injuries.

2. That the evidence in this case is insufficient to warrant or support a verdict by the jury against the defendant, Mountain Fuel Supply Company.

3. That there is no evidence that the defendant, Mountain Fuel Supply Company had any notice or knowledge that gas was leaking or escaping in, under or about cabins No. 303 or 403, being the cabins designated as the Loos and Wheeler cabins, or in, under or about the Bussell cabin, or that the defendant Mountain Fuel Supply Company had any notice or knowledge that there was an odor of gas about those cabins prior to the time of the explosion.

4. That there is no evidence that there was any defect in any of the pipe lines or appliances or their connections in, under or about those cabins, and there is no evidence that the defendant Mountain Fuel Supply Company knew or should have known that there were any such defects.

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5. That the evidence affirmatively shows and without contradiction, that no notice was given to the defendant Mountain Fuel Supply Company of any leak or odor of gas in, under or about those cabins, or any of them.

6. There is no evidence that the explosion was caused by or resulted from any act or failure to act on the part of the defendant Mountain Fuel Supply Company

7. That there is no evidence that the
311 Mountain Fuel Supply Company was negligent in any of the respects alleged in plaintiff's complaint.

8. That the plaintiff has failed to prove any of the acts of negligence set forth in her complaint.

THE COURT: I think your motion for a directed verdict should be denied. We have not sufficient time to go as fully into this question as it deserves. However, it may be presented, in certain events it might be presented upon motion for a new trial, and the court could consider it more fully."

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REQUESTED INSTRUCTIONS OF DEFENDANT, UTAH MOTOR PARK, INC.

40 1. You are instructed to return a verdict in favor of the defendant Utah Motor Park, Inc., and against the plaintiff, no cause of action. (Refused)

2. You are instructed that the happening of the accident in this case is no evidence of negligence upon the part of defendant Utah Motor
41 Park, Inc., nor is the fact that an explosion occurred within, under, or about the portion of said defendant's premises known as cottages numbered 303 and 403 in and of itself any evidence of negligence upon the part of defendant Utah Motor Park, Inc. (Refused)

(In the event the court refuses to give requested instruction No. 2, then defendant Utah Motor Park, Inc., requests as first alternate that the following instructions be given:

2-A. You are instructed that under the uncontradicted evidence in this case defendant Utah Motor Park, Inc., did not have the exclusive control of the appliances and gas within and beneath the premises involved in the explosion by reason of which plaintiff was injured. You are therefore instructed that you have no right to infer negligence on the part of said defendant Utah Motor

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Park, Inc., from the mere happening of the explosion. (Refused)

2-B and 3 given.

44 4. You are instructed that there is no allegation or claim in this case that at the time of renting the cabins or apartment to plaintiff and her husband by defendant Utah Motor Park, Inc., that there was any warranty made by said defendant to plaintiff as to the condition thereof, nor is there any evidence in this case that any such warranty of condition was made by said defendant. You are instructed therefore that in the absence of any such warranty the tenant, Mrs. Loos, took the property and rented the cabin subject to their then condition and subject to all hidden or latent defects therein, if any there were, of which the landlord Utah Motor Park, Inc., had no knowledge. The defendant is liable in this case for damages only in the event plaintiff shall have established by a preponderance of the evidence that there was an unsafe or dangerous condition of the premises which was unknown to plaintiff and known to the defendant Utah Motor Park, Inc., or the existence of which had been so apparent or obvious for such length of time as said defendant with reasonable care and diligence should have known of it. No liability is imposed upon a landlord on account of latent or hidden defects or on account of any un-

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safe or dangerous condition of the premises when the landlord is ignorant of them without fault or negligence on his part.

You are instructed, therefore, in this case that in the event you shall find that the explosion complained of in this case was due to the sudden and unexpected breaking or giving way of some pipe, joint or connection in the gas lines under or within the cottages occupied by Mrs. Loos or one Wheeler, and by reason thereof the accident and
45 injuries complained of in this case occurred, you are instructed that your verdict shall be in favor of the defendant Utah Motor Park, Inc., no cause of action, unless the plaintiff shall have established by a preponderance of the evidence that the existence of such defective or dangerous condition, if any there was, was known to defendant Utah Motor Park, Inc., a sufficient length of time before the explosion to enable said defendant to remedy or correct the same, or unless the existence of such defective or dangerous condition, if any there was, had been obvious for such length of time that said defendant with reasonable care and diligence should have known of the same. (Refused)

46 & 47 5 and 6 given.

48 7. You are instructed that in the event you shall find that the cause of the explosion in this

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case is unknown and not disclosed by the evidence in this case that then and in that event your verdict shall be in favor of the defendant Utah Motor Park, Inc., no cause of action. (Refused)

49 8. You are instructed that in determining the question and issue as to whether defendant Utah Motor Park, Inc., knew or should have known of the existence of the cause of the explosion within a sufficient length of time prior thereto to have enabled the defendant to correct or remedy the same, that it is not sufficient for plaintiff to show the existence of gas odors at other places within the premises of said defendant, or odors arising from other sources than the actual cause of the explosion. It is incumbent upon the plaintiff by a preponderance of the evidence to establish the following facts:

1. What the cause of the explosion was.

49 2. That defendant Utah Motor Park, Inc., knew or should have known of the existence of such condition a sufficient length of time prior to the explosion to enable said defendant to remedy or correct the same.

3. That as a proximate result thereof plaintiff was injured or damaged. (Refused)

50 9. You are instructed that in this case it is

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not sufficient to enable plaintiff to recover from defendant Utah Motor Park, Inc., for her to show that there had been on previous occasions an odor of gas within or about said premises which an ordinarily prudent person in the exercise of due care would ascribe to gas fumes from the ordinary use of appliances or from minor and inconsequential leaks. It is necessary for the plaintiff to establish by a preponderance of the evidence that there was a condition within or under said apartment which involved an unreasonable risk and danger to said tenants, and that said defendant knew of this dangerous condition or in the exercise of reasonable care and diligence should have known thereof a sufficient length of time prior to the explosion to have corrected and remedied the same. (Refused)

51 10. You are instructed that plaintiff in this case has alleged in her amended complaint that after the construction of the building involved in the explosion, defendant Utah Motor Park, Inc., carelessly and negligently excavated a pit near the center of the building and so near the foundation and support of the building as to permit the building to settle and the weight thereof to rest upon the pipes which were projecting through the partition between the apartments, by reason of which the pipes and connections were cracked and broken and gas in large quantities leaked into the

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area under the floor of said cottages and was not permitted to escape therefrom. And plaintiff further alleges in her complaint that defendant Utah Motor Park, Inc., negligently failed and neglected to provide proper and sufficient ventilation beneath the floor of said apartments, and carelessly and negligently closed or permitted the small openings provided as ventilators to be closed and obstructed. Plaintiff further alleges that by reason of said negligence in so causing the pipes to become broken and cracked, and by reason of the lack of ventilation as alleged, that the gas beneath the apartment coming from such broken and cracked pipe became ignited and exploded, thereby causing the injury complained of in this case. You are instructed that plaintiff has produced no evidence of either or any of said acts of negligence as in this instruction set out, and such issues are therefore withdrawn from your consideration and you will disregard the same. (Refused)

REQUESTED INSTRUCTIONS OF DEFENDANT, MOUNTAIN FUEL SUPPLY COMPANY

53 1. You are instructed to return a verdict in favor of the defendant Mountain Fuel Supply Company and against the plaintiff, no cause of action. (Refused)

54 to 58 2, 3, 4, 5, and 6 given.

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59 7. You are instructed that the defendant Mountain Fuel Supply Company had no duty to inspect the gas service pipes or appliances on the premises of the defendant Utah Motor Park, Incorporated, to determine whether or not there were any defects therein in the absence of any notice that gas was escaping therefrom. (Refused.)

60 8. You are instructed that unless you find from the evidence in this case that the defendant Mountain Fuel Supply Company had notice of the defect which caused the explosion and that it failed to exercise reasonable care to remedy it, then you are to return a verdict in favor of the defendant Mountain Fuel Supply Company and against the plaintiff, no cause of action. (Refused.)

INSTRUCTIONS TO JURY REQUESTED BY ATTORNEYS FOR PLAINTIFF, ALICE LOOS

62 1. You are instructed that it was the duty of the defendants in supplying gas to the premises occupied by the plaintiff as a tenant of the Motor Park, to make reasonable and proper inspection of the system by which such gas was supplied, and if you find from the evidence that others at and about said premises frequently observed the odor of gas escaping from said system, you have a right to assume that the defendants, had they made such inspection, would likewise observe said

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odors, and having done so would be charged with the duty of ascertaining the defect in said system which permitted the escape of gas therefrom, and if they failed to make such reasonable inspection, or, having made it and been made aware of the escape of gas, and having failed to repair said system to prevent the further escape of gas therefrom, then you are instructed that such omission or omissions of duty on the part of the defendants would constitute negligence, and if you find that the defendants were negligent in this particular and that as a result thereof the plaintiff was injured, she is entitled to a verdict at your hands. (Refused.)

63 & 64 2 and 3 given.

65 4. You are instructed that the defendants are corporations and as such act only through their officers, agents and employes. If you find from the evidence in this case that there was negligence in the installation of or in the maintenance of the gas furnace or of the pipes and connections conveying gas thereto, as charged by the plaintiff, and that by reason thereof the accident occurred and plaintiff was injured as claimed by her, then she is entitled to a judgment at your hands, and it matters not that such installation was made by an independent contractor, a heating engineer, or by what name such agent or servant

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acted for said defendant or defendants in the performance of such work. (Refused.)

66 & 67 5 and 6 given.

68 INSTRUCTIONS TO THE JURY

Lady and Gentlemen of the Jury:

Instruction No. 1. The plaintiff, for cause of action against the defendants, Mountain Fuel Supply Company, hereinafter called the Gas Company, and Utah Motor Park, Incorporated, hereinafter called the Motor Park, alleges that the defendants, at all times hereinafter mentioned, were and are corporations of the State of Utah; that the defendant Motor Park owned, operated and rented to its patrons and tenants furnished apartments equipped with gas stoves and heaters for their comfort and convenience; that the apartments were located between State and Main Streets south of 9th South Street in Salt Lake City, Utah; that the defendant, gas company, was at the time of the accident complained of, engaged in the business of supplying gas for fuel and other purposes to the public generally and to the Motor Park and its patrons and tenants for use in cooking and in heating said apartments by means of

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pipes laid underground and by connections through underground pipes to the heating and cooking facilities therein; that the defendants had installed in an earthen pit under the floor of Apartment 403 a gas furnace equipped with a pilot light kept constantly burning, which could be turned on and off by the tenant; that that gas was liable to leak from the pipes and connections and
69 to accumulate in the space under the floor and thus liable to become ignited by the pilot light; that it was the duty of the defendants to prevent leaks from the gas pipes and to make frequent inspections to discover any leaks, and also to provide proper ventilation to the pit under the floor so that any accumulated gas might escape and not be ignited by the pilot light.

69 Plaintiff further alleges that on January 22, 1938, she was a tenant in Apartment 403 on the premises of the Motor Park and had paid the rental therefor in advance; that the defendants had carelessly and negligently installed a gas furnace under the apartment, and failed to exercise due care in maintaining the pipes and connections, and failed to make any inspection of the pipes and appliances; that by reason of such acts and omissions quantities of gas leaked from the pipes or connections, accumulated under the apartment occupied by plaintiff, and on January 22, 1938,

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the accumulated gas exploded, driving the floor of the apartment upwards and causing the walls and ceiling to fall on the plaintiff, from which cause she suffered injuries consisting of a fracture of the bones of the left foot, inflammation of the bronchial tubes, bruises and contusions and shock to her nervous system; that her left foot became infected and that on the 14th day of July, 1938, it was necessary to amputate the left foot; that she suffered great pain and mental anguish; that her injuries are permanent and that she has been damaged in the sum of fifty thousand dollars; that she lost personal effects valued at $150.00; that she incurred obligations for medical treatment and hospitalization in the sum of $1466.28; two blood transfusions in the sum of $60.00. She prays judgment against the defendants in the sum of $51,666.28.

70 The defendant, Gas Company, by way of answer to the complaint, admits its corporate existence; that it was engaged in the business of supplying to the defendant Motor Park and others in Salt Lake City gas for fuel and other purposes; admits that the Park Company owned and operated furnished apartments which were supplied with cooking and heating facilities by means of pipes laid underground from its source of supply; also admits that an explosion occurred and that the plaintiff was injured. It denies either gen-

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erally or specifically all of the other allegations of the complaint.

The defendant, Motor Park, by way of answer, admits its corporate existence; that it was
70 supplied with gas for fuel and other purposes by the defendant gas company; admits that it owned and operated furnished apartments referred to in the complaint, which were supplied with gas for fuel and cooking purposes from the system of pipes of the defendant gas company; admits that plaintiff occupied apartment No. 403 as its tenant and that she had clothing, household and personal effects in the apartment; admits that the apartment was on a concrete foundation approximately 20 inches above the surface of the ground; that the apartment was heated by a gas furnace installed in a pit under the floor of the building and equipped with a pilot light; also admits that one of the pipes for the conveyance of gas into the west apartment projected through the partition wall between the west and the east apartment; admits that on January 22, 1938, there was an explosion in the apartment and that the floor was driven upward, causing the walls of the apartment to burst and the ceiling to fall; also admits plaintiff was injured by reason thereof.

71 It alleges that it employed a licensed and competent heating and ventilating engineer for the

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installation of the furnace, and that if there was any carelessness or negligence on the part of the heating and ventilating engineer that the defendant Motor Park had no knowledge of it, or no reasonable ground to believe that there was any carelessness or negligence in connection therewith. It denies either generally or specifically all of the other allegations of the complaint.

72 Instruction No. 2. "Ordinary care" I have defined for you in a separate instruction. You are instructed further that the degree of care which one conveying gas or other dangerous commodities is required to use increases in proportion to the increased danger of the commodity. The defendants, therefore, in supplying gas to the premises occupied by the plaintiff at and immediately before the time of the explosion, were
72 chargeable with that degree of care to prevent damage to the plaintiff which was commensurate to the danger which it was their duty to guard against and avoid.

73 Instruction No. 4. If you find from the evidence that the defendant Mountain Fuel Company knew that the system of pipes within the premises of the defendant Park Company was defective, if you find they were, and that said pipes were leaking and gas was escaping therefrom, it then became the duty of the said Mountain Fuel Supply

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Company to either see that said pipes were placed in proper repair or to discontinue furnishing and delivering gas on said premises until such repairs were made. If, therefore, you further find from the evidence that after said defendant Mountain Fuel Supply Company had knowledge of such defective pipes, and, having such knowledge, if it continued to convey and deliver gas through said system, and gas leaked therefrom and exploded on January 22, 1938, causing injury to the plaintiff, she is entitled to judgment against said defendant Mountain Fuel Supply Company for the injuries occasioned by such explosion.

74 Instruction No. 5. You are instructed that before you would have the right to infer negligence on the part of the defendant Utah Motor Park, Inc., from the mere happening of the explosion that it is necessary for plaintiff to establish by a preponderance of the evidence that the appliances and gas within or beneath the premises involved in the explosion were under the exclusive control of defendant Utah Motor Park, Inc. You are therefore instructed that unless the plaintiff shall have established such exclusive control of the appliances and gas within or about said cabins by a preponderance of the evidence, that there is no inference of negligence from the mere happening of the explosion.

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Instruction No. 6. You are instructed that in this case it is undisputed that the relationship between plaintiff and the defendant Utah Motor Park, Inc., was that of landlord and tenant, and you are instructed that such was the relationship.

75 Instruction No. 7. You are instructed that a landlord is not liable for accident or injuries caused by or due to the existence of hidden, concealed, or latent defects within the premises unless the landlord shall fail to remedy the same within a reasonable length of time after the landlord knows or should in the exercise of reasonable care and caution know of the existence of such defects.

You are instructed, therefore, that in the event you shall find that the explosion in this case occurred by reason of the existence of a defect in the joints or connections in the pipes or appliances within said apartments or beneath the same or within the walls thereof, the existence of which defect, in the event you shall find there was such defect, was known to defendant Utah Motor Park, Inc., and as to the existence of which it had not received notice, then and in that event you are instructed that your verdict should be in favor of defendant Utah Motor Park, Inc., no cause of action.

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76 Instruction No. 8. You are instructed that in the event you shall find that the explosion complained of in this case occurred within, under or about the portion of the premises known as cottages Nos. 303 and 403, occupied by Mr. and Mrs. Loos and Mr. and Mrs. Wheeler as tenants of defendant, Utah Motor Park, Inc., and in the event you shall further find that the range, furnace and other appliances within said Loos and Wheeler cottages were under the operation, control and supervision of Mr. and Mrs. Loos or the Wheelers and not under the operation, supervision and control of the defendant Utah Motor Park, Inc., and in the event you shall further find that the explosion in question might, could have, or probably did occur by reason of the management or operation of said appliances by Mr. and Mrs. Loos or Mr. and Mrs. Wheeler, or by reason of some other agency over which said defendant had no control, then and in that event you are instructed that your verdict should be in favor of defendant Utah Motor Park, Inc., no cause of action.

77 Instruction No. 9. You are instructed that the happening of the accident in this case is no evidence of negligence upon the part of the defendant Mountain Fuel Supply Company, nor is the fact that an explosion occurred within, under, or about the portion of premises known as cottages numbered 303 and 403 of Utah Motor Park

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any evidence of negligence upon the part of the defendant Mountain Fuel Supply Company.

Instruction No. 10. You are instructed that if you find from the evidence that the defendant Mountain Fuel Supply Company had no notice or knowledge that there was gas escaping in or under cabins 303 or 403 on the premises of the defendant Utah Motor Park, Inc., prior to the time of the explosion, then you are to return a verdict in favor of the defendant Mountain Fuel Supply Company and against the plaintiff, no cause of action.

77 Instruction No. 11. You are instructed that there was no duty imposed upon the defendant Mountain Fuel Supply Company to exercise reasonable care to ascertain whether or not service pipes on the property of the defendant Utah Motor Park were free from leaks or defects of which the defendant Mountain Fuel Supply Company had no notice or knowledge.

Instruction No. 12. You are instructed that if you find from the evidence in this case that the defendant Mountain Fuel Supply Company had no knowledge or notice of a defect in the gas pipes or appliances under or in cabins 303 or 403 of the defendant Utah Motor Park, Inc., from which the gas escaped which resulted in the explosion, then you are to return a verdict in favor of the defend-

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ant Mountain Fuel Supply Company and against the plaintiff, no cause of action.

78 Instruction No. 13. You are instructed that unless you find from a preponderance of the evidence in this case that the escape of the gas which caused the explosion was due to some act of negligence on the part of the defendant Mountain Fuel Supply Company, you are to return a verdict in favor of the defendant Mountain Fuel Supply Company and against the plaintiff, no cause of action.

79 Instruction No. 14. You are instructed that negligence is the failure to do what a reasonably prudent person would ordinarily have done under the circumstances of the situation, or doing what such person under such existing circumstances would not have done. The essence of the fault may lie in acting or omitting to act. The duty is dictated and measured by the exigencies of the occasion.

Ordinary care implies the exercise of reasonable diligence, and implies such watchfulness, caution and foresight as, under all the circumstances of the particular case, would be exercised by a reasonably careful, prudent person.

By proximate cause, you are instructed, is meant that cause which in a natural and continu-

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ous sequence, unbroken by any new cause, produced the injury, and without which the injury would not have occurred.

80 Instruction No. 15. If you find for the plaintiff it will then be your duty to fix the amount of her damages. In doing so you will take into consideration the nature and extent of her injuries; the shock and injury to her nervous system, if any you find there were; the pain, suffering and mental anguish she suffered, if any she has suffered, and any pain, suffering or mental anguish which she will hereafter suffer by reason of her injuries and directly caused thereby or resulting therefrom. You will also take into consideration the permanency of her injuries and her inability to perform her usual and customary duties, if you find from the evidence that she will be unable to perform them; also the loss or injury to her property, clothing and effects, if you find any were lost or injured by reason of the accident; and also the expenses incurred by her for hospital, surgical or medical care and attention in the treatment for her injuries, including blood transfusions, not exceeding, however, in total, the sum of $51,716.28.

81 Instruction No. 16. You are instructed that in the event you shall find in favor of the plaintiff, that your verdict may be against either or both of said defendants, for which purpose forms of verdict are furnished to you.

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82 Instruction No. 17: By a preponderance of the evidence is meant the greater weight of the evidence, that which is the more convincing as to its truth. It is not necessarily determined by the number of witnesses for or against a proposition, although, all things being equal, it may be so determined. If you find a conflict in the evidence you should reconcile it, if you can, upon any reasonable theory; and if you cannot do so, then you must determine what you do believe. You are the exclusive judges of the facts submitted to you, and of the credibility of the witnesses. In judging of their credibility you have the right to take into consideration their deportment upon the witness stand, their interest in the result of the suit, the reasonableness of their statements, their apparent frankness or candor or the want of it, their opportunities to know and understand, and their capacity to remember. You have the right to consider any fact or circumstance in evidence which, in your judgment, affects the credibility of any witness. You should weigh the evidence carefully and consider all of it together. You should not pick out any particular fact in evidence or any particular statement of any witness and give it undue weight. You should give only such weight to inferences from the facts proven as in fairness you think they are entitled to. You should consider all the evidence impartially, fairly and without prejudice of any kind, and from such consid-

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eration, in connection with the instructions given you by the Court, you should reach such a verdict as will do justice between the parties. You should not consider any testimony offered but not admitted, nor any evidence stricken out by the Court, but only such evidence as has been admitted in the case. If you believe that any witness on either side of this case has wilfully testified falsely on any material matter, then you have the right to
82 disregard the entire testimony of such witness, unless his testimony is corroborated by other credible evidence. When you retire to consider of your verdict you will select one of your members as foreman. Your verdict must be in writing, signed by your foreman, and when found must be returned by you into court. A concurrence of at least six members of the jury is necessary to your verdict, and six jurors thus concurring may find a verdict.

Given May 8, 1939.

P. C. EVANS, Judge.

323 EXCEPTIONS TO INSTRUCTIONS by defendant Utah Motor Park:

Excepts to the giving of Instruction No. 2, and to the whole thereof, and particularly in that it implies as against the Utah Motor Park a duty greater than that which the law charges a land-

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324 lord with, in that it charges the landlord with the duty to prevent damage to the plaintiff. Excepts to the giving of Instruction No. 4, in that it permits the jury to find that there was some defect in the pipes and that gas was escaping or leaking therefrom, whereas there is no evidence with reference to any such fact; no evidence from which any such condition could be inferred; particularly the last part of the instruction implies that there were defective pipes, and excepts to that part of the instruction wherein it says: "If, therefore, you further find from the evidence that after said defendant Mountain Fuel Supply Company had knowledge of such defective pipes, and, having such knowledge, if it continued to convey and deliver gas through said system" that she would be entitled to a judgment against the Mountain Fuel Supply Company. Excepts to Instruction No. 10 in that it implies that gas was escaping in or under the cabins prior to the time of the explosion, and particularly implies that it was there for a sufficient length of time for the defendants, or some of them, to have knowledge of it. Excepts to Instruction No. 11 in that it implies that there were leaks and defects in the pipes and facilities of the defendant Utah Motor Park. Excepts to Instruction No. 12, in that it implies that there was a defect in the gas pipes or appliances of defendant Utah Motor Park and gas escaped which
325 resulted in the explosion, and infers the existence

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of the fact, whereas, if it is the fact it should have been submitted to the jury instead of implied and accepted by the Court as a fact, as set out in Instruction No. 12. Excepts to the failure of the Court to give its requested Instructions 1, 2, 2-A, 3, 4, 7, 8, 9 and 10.

326 EXCEPTIONS TO INSTRUCTIONS by defendant Mountain Fuel Supply Company.

Excepts to the giving of Instruction No. 2, and to the whole thereof. Excepts to the giving of Instruction No. 4, and particularly that portion thereof wherein it is stated: "If you find from the evidence that the defendant Mountain Fuel Supply Company knew that the system of pipes within the premises of the defendant Park Company was defective," upon the ground and for the reason
327 that there is no evidence in this case that the defendant knew, or should have known, that there were any defects whatsoever in the system of pipes within the premises of the defendant Utah Motor Park Company, and the giving of said instruction is misleading and is contrary to and against the law. Excepts to the giving of Instruction No. 15, and to the whole thereof, upon the ground and for the reason that the said instruction is contrary to and against the law. Excepts to the failure of the Court to give the requested instruction of the defendant Mountain Fuel Sup-

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ply Company numbered "1", upon the grounds and for the reasons heretofore stated in the motion for a directed verdict made by the defendant Mountain Fuel Supply Company, which grounds and reasons are incorporated in these exceptions as though they were fully stated herein.

EXCEPTIONS TO INSTRUCTIONS by plaintiff:

Excepts to Instruction No. 5, and to the whole thereof, and to that part of the instruction reading as follows: "You are therefore instructed that unless the plaintiff shall have established such exclusive control of the appliances and gas within or about said cabins by a preponderance of the evidence, that there is no inference of negligence from the mere happening of the explosion." Excepts to the giving of Instructions No. 6 and to No. 7 and to the whole thereof, and also to that
328 part of that instruction reading as follows: "You are instructed that a landlord is not liable for accident or injuries caused by or due to the existence of hidden, concealed, or latent defects within the premises unless the landlord shall fail to remedy the same within a reasonable length of time after the landlord knows or should in the exercise of reasonable care and caution know of the existence of such defects." Excepts also to the giving of the balance of that instruction, which is the second

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paragraph. Excepts to the giving of Instruction No. 8, and also excepts to the giving of that portion of the instruction reading as follows: "In the event you shall further find that the explosion in question might, could have, or probably did occur by reason of the management or operation of said appliances by Mr. or Mrs. Loos or Mr. and Mrs. Wheeler, or by reason of some other agency over which said defendant had no control, then and in that event you are instructed that your verdict should be in favor of defendant Utah Motor Park, Incorporated, no cause of action." Excepts to the giving of Instructions No. 9, 10, 11, 12 and 13, and to the whole thereof.

VERDICT OF JURY

83 We, the Jurors impaneled in the above case, find the issues in favor of the plaintiff and against the defendants on the plaintiff's amended complaint, and assess her damages in the sum of $21,716.00.

Dated May 8, 1939Filed May 9, 1939.

87 JUDGMENT ON VERDICT in favor of plaintiff and against the defendants in the sum of $21,-716.00. Dated May 8, 1939—Filed May 9, 1939.

88 MEMORANDUM OF COSTS AND DISBURSEMENTS in the sum of $48.00 served May 10, 1939—Filed May 12, 1939.

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89 NOTICE OF INTENTION TO MOVE FOR NEW TRIAL by defendant Mountain Fuel Supply Company, a corporation, served May 13. 1939 —Filed May 13, 1939.

91 MOTION FOR NEW TRIAL of defendant Utah Motor Park, Incorporated, served May 13, 1939—Filed May 13, 1939.

93 MOTION FOR NEW TRIAL of defendant Mountain Fuel Supply Company, served May 13, 1939—Filed May 13, 1939.

95 NOTICE OF HEARING ON MOTIONS FOR NEW TRIAL, served May 15, 1939—Filed May 16, 1939.

96 ENTERED ORDER pursuant to oral stipulation that hearing of the defendants' motions for new trial be continued to Saturday, June 3, 1939. Dated and entered May 27, 1939.

97 ENTERED ORDER continuing hearing on motions for new trial to Saturday, June 6, 1939. Dated and entered June 3, 1939.

98 ENTERED ORDER motions for new trial taken under advisement June 6, 1939.

99 STIPULATION and ORDER extending time for preparation, service and filing of defendants'

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bill or bills of exceptions until October 15, 1939. Dated September 7, 1939—Filed September 7, 1939.

100 ENTERED ORDER by P. C. Evans, Judge, August 11, 1939.

The defendants' motion for a new trial having been heretofore argued to the Court by respective counsel and submitted and by the Court taken under advisement, it is now ordered that the Judgment in the within case is hereby reduced to the sum of $12,716.00. It is further ordered that in the event the plaintiff accepts the reduction of the judgment the said motions for a new trial are denied. It is further ordered that in the event the plaintiff refuses to accept the reduction of the judgment, the said motions for a new trial are by the Court granted.

101 NOTICE OF ACCEPTANCE OF JUDGMENT AS MODIFIED

To the said Court, and to Ingebretsen, Ray, Rawlins & Christensen and Joseph Jones, attorneys for defendant Mountain Fuel Supply Company, and Badger, Rich & Rich, attorneys for defendant Utah Motor Park, Incorporated:

You will please take notice that the plaintiff elects to accept the judgment in the above entitled

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action, as modified by said Court, and consents, by reason of the ruling of said Court on motion for new trial made by the defendants, that said judgment be so reduced.

L. B. WIGHT, Attorney for Plaintiff.

ORDER

On receiving and filing the above consent of the plaintiff, it is ordered that the judgment made and entered in said cause be reduced by $9,000.00, and that the motions of the defendants for a new trial be and the same are denied.

Dated this 6th day of September, 1939.

P. C. EVANS, Judge.

Served September 5th, 1939—Filed September 6, 1939.

102 ENTERED ORDER granting to defendants to and including October 15, 1939, to prepare, serve and file bill of exceptions, September 7, 1939.

103 ENTERED ORDER settling and approving bill of exceptions October 16, 1939.

104 NOTICE OF APPEAL of Defendants

To the Plaintiff, Alice Loos, and to Her Attorney, L. B. Wight, Esq.:

You and each of you will please take notice that the defendants in the above entitled action,

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Mountain Fuel Supply Company, a corporation, and Utah Motor Park, Incorporated, a corporation, and each of them hereby appeal to the Supreme Court of the State of Utah, from the judgment made and entered in the above entitled action on the 8th day of May, 1939, in favor of the above named plaintiff and against the above named defendants in the sum of Twenty-One Thousand Seven Hundred Sixteen and No/100 Dollars ($21,716.00) as modified and reduced to the sum of Twelve Thousand Seven Hundred Sixteen and No/100 Dollars ($12,716.00), with the acceptance of the reduction and modification by the plaintiff, pursuant to the order of the above entitled court made and entered herein on the 11th day of August, 1939, by the order made and entered herein on the 6th day of September, 1939, and from the whole thereof, and the defendants and each of them appeal from the judgment made and entered herein on or about the 6th day of September, 1939, in favor of the plaintiff and against the defendants and each of them for the sum of Twelve Thousand Seven Hundred Sixteen and No/100
105 Dollars ($12,716.00), pursuant to the said order made and entered herein on the 11th day of August, 1939, and the said order made and entered on the 6th day of September, 1939; it being the intention of the defendants and each of them hereby to appeal to the Supreme Court from the final judgment made and entered in this cause in favor

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of the plaintiff and against the defendants and each of them for the sum of Twelve Thousand Seven Hundred Sixteen and No/100 Dollars ($12,-716.00), whether that judgment be the judgment made and entered herein on the 8th day of May, 1939, as modified and reduced, with the consent of the plaintiff, by the subsequent orders of this Court made and entered on or about the 11th day of August, 1939, and on or about the 6th day of September, 1939, respectively, or whether that judgment be the judgment made and entered on or about the 6th day of September, 1939, in favor of the plaintiff and against the defendants and each of them in the said sum of Twelve Thousand Seven Hundred Sixteen and No/100 Dollars ($12,-716.00), pursuant to said orders.

Served November 10, 1939—Filed November 10, 1939.

106 STIPULATION that defendants may each file separate corporate surety bonds on appeal in the sum of $15,000.00 in lieu of filing undertaking in double the amount of the judgment.

Dated November 10, 1939—Filed November 10, 1939.

108 CLERK'S CERTIFICATE of proceedings, judgment roll and bill of exceptions, and certificate that undertaking on appeal in due form was filed

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on November 20, 1939, and certificate of transmittal dated December 6, 1939.

ASSIGNMENTS OF ERROR OF DEFENDANT MOUNTAIN FUEL SUPPLY COMPANY:

Comes now the Defendant and Appellant Mountain Fuel Supply Company, a corporation, and makes the following assignments of error upon which it relies for reversal of the judgment of the lower court:

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269 1. That the Court erred in denying and in failing to grant the motion of said defendant for a nonsuit in its favor and against the plaintiff in that: (Ab. p. 52, 53, 55)

A. There was no evidence to sustain or justify a verdict or decision in favor of the plaintiff and against said defendant.

B. The evidence was insufficient to sustain or justify a verdict in favor of the plaintiff and against said defendant in that:

(1) There was no evidence that the explosion which resulted in injuries to plaintiff was caused by any negligence of said defendant;

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(2) There was no evidence that the explosion resulting in injuries to plaintiff was caused by any gas leak or leaks in any gas pipes, gas appliances or their connections, and there was no evidence that there were any defects, cracks or breaks whatsoever in any gas pipes, gas appliances or their connections which caused said explosion;

(3) There was no evidence that said
274 defendant had any notice or knowledge that there were any gas leaks or defects or
252 cracks or breaks in any gas pipes, gas ap-
253 pliances or their connections which had anything whatsoever to do with the explosion;

(4) There was no evidence that said defendant had any notice or knowledge that the gas which caused the explosion was escaping from gas pipes or gas appliances or their connections.

(5) That there was no evidence that said defendant furnished, sold, or installed or maintained any of the gas pipes, gas appliances or connections involved in said explosion; there was no evidence that it had anything whatsoever to do with the construction, alteration or maintenance of the

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cabins involved in said explosion; there was no evidence that there were any cracks, breaks, or defects of any kind in any of said pipes, appliances or connections or that there were any defects in the construction or maintenance of said cabins or in the installation of the gas pipes, appliances or their connections therein, or that there was insufficient or improper ventilation under said cabins; and there is no evidence that said defendant knew or should have known that any gas was escaping or leaking from said pipes or appliances, or that there were any defects, cracks, or breaks in any of said pipes, appliances or connections or in the installation thereof, or that there were any defects in the construction of said cabins or that there was insufficient or improper ventilation under the floors of said cabins.

252 253 274 (6) The evidence affirmatively shows that no notice was given to said defendant of any gas leak or gas odor in or about any of the cabins involved in the explosion. (Ab. p. 46, 56, 69.)

2. That the court erred in denying and failing to grant the motion of said defendant for a directed verdict in its favor and against the plain-

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tiff upon the grounds and for the reasons hereinabove specified in connection with the assigned error of the court in denying and in failing to grant said defendants' motion for non-suit and for the reason set forth in said defendant's motion for a directed verdict. (Ab. p. 74, 75, 76.)

3. That the lower court erred in refusing to give to the jury requested Instruction No. 1 of said defendant upon the grounds and for the reasons hereinabove specified in connection with the assigned error of the court in denying and in failing to grant said defendants' motion for non-suit and for the reasons set forth in said defendants' motion for a directed verdict. (Ab. p. 82, 74, 75, 76, 99, 100.)

4. That the lower court erred in giving to the jury Instruction No. 2 for the reason that said instruction as given is contrary to and against the law. (Ab. p. 89, 99.)

5. That the lower court erred in giving to the jury Instruction No. 4 and particularly that portion thereof wherein it is stated, "If you find from the evidence that the defendant Mountain Fuel Supply Company knew that the system of pipes within the premises of the defendant Park Company was defective," upon the ground and for the reason that there is no evidence in the record that said defendant knew or should have known that

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there were any defects whatsoever in said system of pipes, and there is no evidence that the system of pipes within the premises of the defendant Park Company were defective. (Ab. p. 89, 90, 99.)

101 93 94 6. That the lower court erred in denying and in failing to grant the motion of said defendant for a new trial for the reasons set forth in assignments of error No. 1 and No. 2 hereof. (Ab. p. 102.)

WHEREFORE, said defendant and appellant prays that the judgment of the district court be reversed for and on account of the errors hereinabove enumerated.

ASSIGNMENTS OF ERROR OF DEFENDANT UTAH MOTOR PARK:

Comes now the defendant and appellant Utah Motor Park, Incorporated, a corporation of the State of Utah, and respectfully says that there is manifest error in the record, proceedings and judgment of the trial court in the above entitled cause, and respectfully assigns errors as follows, to-wit:

I.

The trial court erred in denying the motion of said defendant Utah Motor Park, Incorporated,

for a judgment of non-suit; that there was insufficient evidence to sustain or justify the decision and order of said Court in this, that the plaintiff failed to establish any negligence of said defendant as alleged in the complaint which proximately caused or contributed to the accident or injury in said cause; that plaintiff failed to prove that any pipes or connections within or about the premises of said defendant become cracked or broken or developed leaks and permitted gas to escape into or under the floor of the apartment occupied by plaintiff, and wholly failed to prove or establish by any evidence whatsoever that any gas from a cracked, broken, or leaky pipe, or connection escaped into or under the floor of said apartment, and wholly failed to prove or establish by any evidence that any gas from any cracked, broken, leaky or defective pipe or connection caused the explosion in question in said cause; that plaintiff wholly failed to establish or prove by any evidence whatsoever that after the construction of said building defendant carelessly, negligently, or otherwise excavated a pit for the installation, and installed, a furnace at or near the center of said building and so near the foundation and support of said building under the partition separating said apartment as to permit the same to settle and the weight thereof to rest upon the pipes furnishing gas to the furnace and projecting through the partition between

the apartments; that plaintiff wholly failed to establish or prove that said defendant carelessly and negligently failed and neglected to provide proper and sufficient ventilation for the area under said apartments, and carelessly and negligently closed or permitted the small openings provided as ventilators to be closed and obstructed; that on the contrary plaintiff's own evidence established the contrary thereof; that plaintiff wholly failed to establish by any competent evidence that defendant failed and omitted to make frequent inspection of said pipes, connections, or premises; plaintiff failed to establish by any evidence that defendant continued to furnish gas under pressure to the apartment occupied by plaintiff after it knew or should have known that any pipes were broken, defective, and leaking gas, and that the ventilators thereof were closed and obstructed, but on the contrary plaintiff's evidence affirmatively showed that any gas so furnished to plaintiff was furnished by defendant Mountain Fuel Supply Company, a corporation; and wholly failed to establish or prove by any competent evidence that any pipes were broken, defective and leaked, and wholly failed to establish by any evidence that the ventilators thereof were closed and obstructed; that plaintiff further failed to establish by any competent evidence that any act, deed, or omission of said defendant proximately caused or contributed to any accident or injury to plaintiff; that plaintiff

failed to establish or prove by any competent evidence that there was any defect whatsoever in the premises occupied by plaintiff, and wholly failed to prove or establish by any evidence that defendant knew or should have known of the existence of any such alleged defect or defective condition. (Tr. 268, 269, Ab. p. 54, 55.)

II.

That the Court erred in giving instruction Number 2. That the evidence to sustain or justify the giving of such instruction was insufficient; that there was no evidence whatsoever to the effect that this defendant was supplying gas to the premises occupied by plaintiff; that on the contrary the uncontradicted evidence showed and established that said defendant was the landlord and that plaintiff was a tenant of said premises. (Tr. 315, 323, 324, Ab. p. 89, 97, 98.)

III.

That the Court erred in the giving of instruction number 4. That the evidence to justify or sustain the giving of such instruction was insufficient; that said instruction implies and infers that plaintiff had presented some evidence to the effect that the system of pipes within the premises of defendant Utah Motor Park was defective, leaking, and that gas was escaping therefrom, and that gas

coming from defective or leaking pipes caused the explosion and injury to plaintiff; that there was no evidence in said cause that any pipes whatsoever were leaking or defective, and that there was no evidence whatsoever that gas from any such source caused the explosion or injury; that if there was any evidence whatsoever, which defendant denies, of the fact that any pipes were defective or leaking, that said instruction assumed and imputed the existence of such facts instead of permitting the jury to find with reference thereto. (Tr. 316, 324, Ab. p. 89, 90, 98.)

IV.

The Court erred in giving instruction number 10. That the evidence to justfy or sustain the giving of such instruction was insufficient; that the Court assumed that it was established by the evidence that there was no conflict with reference thereto that gas was escaping in or under cabins 303 or 403 prior to the time of the explosion; that in making such assumption the Court took said question from the jury instead of leaving it for the jury to determine, whether gas was escaping in or under the said cabins prior to the explosion. (Tr. 319 324, Ab. p. 93, 98.)

V.

The Court erred in giving instruction numbe:

11. That the evidence to justify and sustain the giving of such instruction is insufficient; said instruction assumes that there were leaks and defects in the service pipes of defendant Utah Motor Park; that there was no evidence with reference thereto, or if there was any evidence with reference thereto it was for the jury to find as a fact. (Tr. 319, 324, Ab. p. 93, 98.)

VI.

The Court erred in the giving of instruction number 12. That the evidence to justify and sustain the giving of such instruction was insufficient; said instruction implies, infers, and states that there was a defect in the gas pipes or appliances under or in cabins 303 or 403 of defendant Utah Motor Park, Incorporated, and implies, infers, and states that gas escaped therefrom which resulted in the explosion and injury to plaintiff; that there was no evidence of any defect in the gas lines or appliances; that there was no evidence that the gas which caused the explosion and injury to plaintiff was from any such alleged defect in the gas lines or appliances; that if there was any such evidence that it was an issue of fact to be found by the jury, and that the Court erred in instructing the jury that such defect existed and that gas from such source caused the explosion and resulted in the injury to plaintiff. Tr. 319, 320, 324, 325, Ab. p. 93, 94, 98, 99.)

VII.

That the Court erred in refusing to give defendant's requested instruction number 1. (Tr. 40, 325, Ab. p. 77, 99.)

VIII.

The Court erred in refusing to give defendant's requested instruction number 2. That the evidence to justify and sustain the refusal of the Court to give said instruction is insufficient; that the uncontradicted and affirmative evidence in said cause was to the effect that all appliances, pipes and connections within said premises were under the exclusive control of plaintiff and other tenants in said premises, and that the gas used in said premises was being supplied by defendant Mountain Fuel Supply Company. (Tr. 41, 325, Ab. p. 77, 99.)

IX.

That the Court erred in refusing to give requested instruction number 2-A. Tr. 41½, 325 Ab. p. 77, 78, 99.)

X.

That the Court erred in refusing to give defendant's requested instruction number 4. (Tr. 44, 325, Ab. p. 78, 79, 99.)

XI.

That the Court erred in refusing to give defendant's requested instruction number 7. (Tr. 48, 325, Ab. p. 79, 80, 99.)

XII.

That the Court erred in refusing to give defendant's requested instruction number 8. Tr. 49, 325, Ab. p. 80, 99.)

XIII.

That the Court erred in refusing to give defendant's requested instruction number 9. (Tr. 50, 325, Ab. p. 80, 81, 99.)

XIV.

That the Court erred in refusing to give defendant's requested instruction number 10. (Tr. 51, 325 Ab. p. 81, 82, 99.)

XV.

That the Court erred in denying the motion of said defendant Utah Motor Park, Incorporated, for a new trial. That the evidence to justify and sustain the decision of the Court in denying said motion is insufficient in the particulars set forth

herein with reference to denial of the motion for non-suit, to which reference is hereby made and by such reference made a part hereof. (Tr. 91, 92, 101, Ab. p. 102, 103, 104.)